

1999

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Recommended Citation

Barbara A. Vestal, *Dueling With Boat Oars, Dragging Through Mooring Lines: Time For More Formal Resolution Of Use Conflicts In States' Coastal Waters?*, 4 Ocean & Coastal L.J. (1999).

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DUELING WITH BOAT OARS, DRAGGING THROUGH MOORING LINES: TIME FOR MORE FORMAL RESOLUTION OF USE CONFLICTS IN STATES' COASTAL WATERS?

*Barbara A. Vestal**

I. INTRODUCTION AND BACKGROUND

Escalating use conflicts, the inertia of federal agencies, and a growing appreciation of the value of states' public trust resources support the assertion that state governments should take the lead in adopting comprehensive conflict resolution strategies for their coastal waters. The first section of this Article reviews growing marine use conflicts and analyzes why states should concern themselves with conflict resolution efforts in the marine realm. Section II briefly discusses the complex interplay of state and federal law in regulating marine uses. Section III, using the State of Maine as a case study, explores its existing legal framework for management of submerged lands and waters above those lands. It looks at the degree to which Maine's public trust doctrine contributes to resolution of use conflicts, analyzes municipal authority for management of harbors and submerged lands, and reviews state agency regulatory authority, focusing on the submerged lands lease program. This case study is followed by an analysis of conflict resolution mechanisms used in other states that may have particular applicability to improving the management of Maine's coastal waters. The conclusion offers recommendations for improving the formal framework for conflict resolution in marine waters.

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*A. Growing Marine Use Conflicts Mandate Increased
State Involvement*

Marine waters and resources make critical contributions to the economic, social, and ecological well-being of coastal states. In the past, such water resources were generally available to private users on a first-come basis, without state or local regulation. However, over the last few decades, the use of marine waters has increased, resulting in growing use conflicts. Concurrently, increasing use has spawned a plethora of single-focus regulatory agencies and narrow purpose laws which are generally not designed to resolve conflicts among many uses.

Use conflicts involve issues of space allocation, resource allocation, and allowable resource degradation.¹ Newspaper reports increasingly reflect the pervasive nature of these conflicts.²

1. Examples include: the opposition by commercial fishermen to oil and gas exploration; conflicts between different vessel types; public concern over the risks of tanker spills; conflicts between different types of fishing gear; conflicts between shellfish harvesters and recreational boaters over water quality, dredging, and marinas; conflicts between aquaculturists and capture fisheries; and competition for harbor space by all marine users. Municipalities and others seeking to use marine waters for waste disposal find themselves in increasing conflict with shellfish harvesters, recreational users, the tourism industry, environmental groups and others who oppose degradation of the water quality.

2. Bruce Kyle, *Matinicus Combatants Swap Olive Branches*, BANGOR DAILY NEWS, Apr. 28, 1995, available in 1995 WL 5825148 (beach skirmish involving men dueling with boat oars said to be the result of cargo ships damaging lobster traps); Laurie Schreiber, *Maine Considers Allowing Draggers to Move Closer to Pens?* ATLANTIC FISH FARMING, May 27, 1995, at 1 (reports problems off Eastport, Maine where it was alleged that draggers antagonistic to fish pen aquaculture had dragged through the area, tearing up pen mooring lines); Clayton Beal, *Green Party Plans Public Clam Forum*, BANGOR DAILY NEWS, Mar. 21, 1995, available in 1995 WL 5820207 (reporting on continuing disputes between clammers and wormers over whether flats closed to the harvest of clams for conservation purposes should also be closed to the taking of marine worms); Clayton Beal, *Sandworm Diggers Remain on Strike*, BANGOR DAILY NEWS, May 30, 1995, available in 1995 WL 8761403 (worm diggers complaining about mussel draggers destroying the sandworm and bloodworm habitat); Emmet Meara, *Maine Fishermen Join Efforts to Resolve Industry's Problems*, BANGOR DAILY NEWS, Mar. 4, 1995, available in 1995 WL 5819088 (lobstermen alleging that groundfish draggers disturb lobster habitat and destroy lobster traps); *Brunswick Cleans up Coast for Clams, Banned Discharge Systems Removed*, BANGOR DAILY NEWS, Aug. 26, 1993, available in 1993 WL 6327622 (clammers and local officials complaining that shorefront homeowners with "overboard discharge" waste disposal systems keep otherwise productive clam flats closed to digging); *State Officials Reconsider Plan to Close Clam Flats*, BANGOR DAILY NEWS, Mar. 25, 1995, available in 1995 WL 5822779 (state officials evaluating closing of productive clam flats because of potential pollution from illegally discharged waste water from the increasing number of pleasure boats).

It is in the states' best interest to increase their involvement in resolving marine use conflicts. The existing federal and state laws, as modified from time to time by single-interest amendments proposed by discrete user groups, are unequal to the task of appropriately resolving these multiple use conflicts. The states' fiduciary, economic development, and sovereign interests are not well-served by a laissez faire approach. To maximize the utility of this common property resource, a state must: 1) develop a comprehensive statement of goals and priorities for marine waters to establish the context within which allocation decisions will be made about conflicting demands on public resources; 2) review existing allocation mechanisms, and as appropriate, develop new mechanisms to implement the allocation decisions; and 3) develop sectoral management strategies which are consistent with those goals and priorities.

1. *Coastal Waters Are a Public Resource of the State*

The submerged lands adjacent to each state, out to the three-mile limit,³ are owned by each state.⁴ This state ownership applies to the sea bed, the water column, and the plant and animal life living within these waters. The state has certain fiduciary responsibilities to hold these lands for the benefit of the public.⁵

The state has at least three different, but not necessarily mutually exclusive, interests to consider in the management of these lands: 1) its fiduciary responsibility as trustee of publicly owned submerged lands; 2) its governmental responsibility to enhance the long-term economic, environmental and fiscal well-being of all of its citizens; and 3) its desire as an independent sovereign to reduce the interference from other states or the federal government.

2. *Not All Demand Can Be Accommodated*

Approximately fifteen years ago, a federal study seeking a new perspective on ocean management observed:

3. Unless otherwise established as a greater distance as in Florida and Texas. *See* United States v. Louisiana, 363 U.S. 1 (1960); United States v. Texas, 339 U.S. 707 (1950).

4. The Submerged Lands Act, ch. 345, 67 Stat. 462 (1953) (codified as amended at 43 U.S.C. §§ 1301-1315 (1994)). The Submerged Lands Act quitclaimed to coastal states all federal ownership rights in the three-mile territorial sea, subject to certain reserved federal rights, and retained federal rights to the seabed and subsoil beyond three miles. *Id.*

5. *See infra* Part III.B.1.

[M]uch of ocean space is already allocated: to fishing, navigation, national security, recreation, atmospheric maintenance, and sustenance of a vast web of interconnected life forms and geological processes. They are not a last frontier in the sense of unused land, nor are they free of jurisdictional and policy constraint.

...

Greater pressure to use the oceans can already be seen, but its full force is probably some years away. It is also probable that not all of this demand can be accommodated, although national philosophy and political inclinations may be reluctant to respond to this limitation.⁶

All indicators suggest that these space and resource allocation issues have increased in intensity and complexity over the last fifteen years.⁷ There is an increasing concentration of human population within the coastal region. Since the early 1980s, the annual growth rate of population in U.S. coastal counties has been significantly higher than in coastal states or in the nation as a whole.⁸ This trend is expected to continue, with an estimated fifty-nine percent of the nation's 1980-2000 population growth expected to occur in the coastal zone.⁹

In addition to an increased population adjacent to coastal waters, tourism and recreational use of these waters is increasing.¹⁰ Traditional pastimes such as boating and recreational fishing, along with relatively new

6. JOHN M. ARMSTRONG & PETER C. RYNER, U.S. DEP'T OF COMMERCE, OCEAN MANAGEMENT: SEEKING A NEW PERSPECTIVE 56 (1980).

7. For example, NOAA's Sea Grant College Program and NOAA's Coastal Ocean Program have both identified conflicts among multiple users of ocean and near-shore space as one of the most important issues currently facing the marine community. UNIV. OF ME./UNIV. OF N.H. SEA GRANT COLLEGE PROGRAM, LONG RANGE PLAN 14, 29-30 (1992) (need to identify mechanisms to resolve conflicts among traditional commercial fisheries employing different gear types, between commercial harvesters and aquaculturists, between recreational and commercial harvesters, and a myriad of non-fisheries access and use conflict issues posed by growth along the New England coastal corridor); NOAA COASTAL OCEAN PROGRAM, SOCIAL AND ECONOMIC RESEARCH TEAM WORKSHOP FOR COASTAL PROGRAM, MULTIPLE USE CONFLICT WORK GROUP RESEARCH RECOMMENDATIONS (Silver Spring, MD, Sept. 24-25, 1991).

8. CTR. FOR URBAN AND REG'L STUDIES, UNIV. OF N.C. AT CHAPEL HILL, VALUING COASTAL ZONE MANAGEMENT 16 (Charles S. Colgan ed., 1990). This trend was projected to continue at least through 2000.

9. *Id.* at 5.

10. Edward D. Goldberg, *Competitors for Coastal Ocean Space*, OCEANUS, Spring 1993, at 13.

ocean-based leisure activities such as sea kayaking, personal thrill craft, wind surfing, cruising sail boats, and whale watching, increase public use of coastal waters.¹¹ Domestic cruise ship travel has also increased in the last decade, as an increasing proportion of travelers opt to avoid international instability.¹²

Closely related to the increased popularity of marine waters is a trend toward building shops, offices, residences, and other non-water dependent uses on or near the shore. These non-marine uses, seeking to capitalize on the marine ambiance, expect unobstructed vistas of undeveloped waters and the absence of objectionable noise and odors, frequently in direct conflict with the needs of competitive working ports and marine industries.¹³

Finally, emerging marine industries, made possible by recent technological developments, bring with them new concepts of how marine resources should be used. Aquaculture, emerging as a fast-growing industry, relies on agricultural concepts of exclusive use of sea bed or water column space and private ownership of the living resources located within that space; this is in direct contrast to the non-exclusive, capture approach of traditional fisheries. Similarly, endeavors viewing the oceans as a potential source of renewable energy place new value on characteristics of marine waters such as temperature differences between waters of varying depths, tidal power, wave energy, and ocean current energy.¹⁴

Thus, as more people are concentrated in coastal regions and an increasing number of enterprises place different values on a wide variety of marine resources, it becomes increasingly clear that not all of the demand can be accommodated. Hard choices have to be made to minimize the costs of continued, unresolved conflicts.

11. See Phyllis Austin, *Fishing for a Future: Self-reliant Stonington Faces up to Tourism with Some Trepidation*, MAINE TIMES, July 29, 1994, § 1, at 2, available in LEXIS/NEXIS, NEWS/ARCNEWS file. Letitia Baldwin, *Ways Sought to Protect Sea Bird Habitat*, BANGOR DAILY NEWS, Nov. 2, 1995, available in 1995 WL 10898059.

12. Jon Marcus, *Cruising: North American Sailing into Fall, More Cruises Are Lining up to Capture the Colors of Autumn Blazing Close to Home*, L.A. TIMES, Aug. 7, 1994, at L8.

13. See MARINE LAW INST., *MANAGING THE SHORELINE FOR WATER DEPENDENT USES* (1988).

14. See Carolyn Elefant, *Ocean Energy Development in the 1990s*, 14 ENERGY L.J. 335 (1993).

3. *Difficulty of Managing Common Property Resources*

Resources which are publicly owned or owned in common are often referred to as "common property resources" or "common pool resources." Submerged lands and living marine resources are examples of this type of resource.¹⁵

A unique set of issues is raised by common property resources. Absent a management regime, they are equally available to everyone but no one can exclude others from making use of them. This situation can result in waste of the resource in two ways: its degradation through uncontrolled overuse, or loss of its value through underuse because of insufficient incentives to invest in infrastructure or other improvements to facilitate maximum use. Many theories, such as the tragedy of the commons, the economics of public goods, and the prisoner's dilemma, have been advanced by theorists to explain complexities involved in use and allocation of this type of resource.¹⁶

However, individuals sharing a common resource are not necessarily trapped in a tragedy. In theory, development of an appropriate form of management can avoid waste due to under or overuse, and can more rationally protect and allocate common property resources.

Broadly speaking, at least three different policy prescriptions for management of common resources have been advanced: 1) self-regulation by stakeholders or users through shared decision-making, often referred to as co-operative management;¹⁷ 2) privatization of common resources through the creation of private property rights; and 3) a centralized management solution which relies on strengthened governmental management to allocate resources, such as through governmental agency determination of permitted uses and users.¹⁸

For a common pool resource such as state marine waters, where there is currently no comprehensive management plan, the future management emphasis must be placed on strengthening governmental management first,

15. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

16. See ELINOR OSTROM, *GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION* 2-7 (1990) (descriptions of the tragedy of the commons, the prisoner's dilemma game and the logic of collective action).

17. See Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 9 (1991).

18. An example of which would be through agency determination of permitted uses and users. OSTROM, *supra* note 16, at 1.

rather than relying on co-operative management or increased privatization to provide appropriate management. A precondition for effective management of this common resource is the development of a public consensus, through governmental leadership, on the broad goals, priorities and guiding principles for allocation decisions. Neither co-operative management¹⁹ nor privatization of the resource are equal to the task of conflict resolution and resource allocation. Where there are ongoing disputes among a multiplicity of user groups which value disparate resource functions and values,²⁰ neither co-operative management nor privatization are designed to optimize the interests of the general public, except as those interests coincide with the self-interest of commodity or resource users.²¹ While self-regulation by

19. In analyzing multiple local fisheries co-management efforts, observations about the most favorable conditions for development and maintenance of co-management suggest that a co-management strategy is most feasible only for a well defined user sub-group rather than for the entire range of water users. Evelyn Pinkerton, *Introduction: Attaining Better Fisheries Management through Co-Management*, in CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES: NEW DIRECTIONS FOR IMPROVED MANAGEMENT AND COMMUNITY DEVELOPMENT 27 (Evelyn Pinkerton ed., 1989). Pinkerton determined that the best environment for co-management is a fairly small area such as a watershed or local waters, "where the number of fishermen or communities is not too large for effective communication, or where there are well-organized sub-groupings . . . which communicate well with each other or have effective umbrella organizations," and where the government bureaucracy is small in size and has a regional or local mandate. *Id.* at 27-28.

20. Theories of optimum management of common pool resources have generally been developed in the context of a small-scale resource, such as a particular inshore fishery, irrigation system, communal forest, or grazing area. *See id.* at 26-28; OSTROM, *supra* note 16, at 26 (a study of small-scale common property resources located in one country, affecting 50 to 15,000 individuals who are heavily dependent on the resource for economic returns). While some of these theories anticipate the need to work with a broad range of groups to foster protection of habitat, they generally emphasize a single resource. They might include consideration of activities which degrade the target resource by positing that individuals engaged in that activity are receiving an "indirect allocation" of that resource. But even though they acknowledge the role of competing user groups in affecting allocation of a key resource these policy prescriptions are not designed to mediate disputes among a multiplicity of resource functions and values, as would be required of a state-wide marine resource management plan. R. Bruce Rettig et al., *The Future of Fisheries Co-Management: A Multi-Disciplinary Assessment*, in CO-OPERATIVE MANAGEMENT OF LOCAL FISHERIES, *supra* note 19, at 278.

21. For example, co-operative management research is generally focused on how to "enable individuals to achieve productive outcomes in situations where temptations to free-ride and shirk are ever present." OSTROM, *supra* note 16, at 15. A typical measure of economic success is whether the individuals dependent on a particular shared resource for their economic well-being can optimize their mutual good. Pinkerton, *supra* note 19, at 5. While this is certainly a relevant consideration, whether it should be the primary measure of success in a state-wide marine resource management plan is questionable at best. Many

stakeholders or privatization may eventually play a role, the critical first step in adopting and implementing a comprehensive management program requires strengthened governmental leadership in coastal waters.

Actual establishment of the procedures and institutions to implement a state-wide management plan will be a very complex process.²² It is likely that as implementation efforts become more resource-specific, the state-wide management plan will eventually combine aspects of all of these approaches. The challenge will be to identify which combinations of approaches are most promising for specific resources,²³ while at the same time maintaining comprehensive state oversight so that the individual parts combine into a rational overall strategy consistent with public values.

Co-management is most feasible if attempted on a relatively small-scale, with simple functions to be managed by well organized representative sub-groups which communicate well with each other.²⁴ While these conditions are absent on a state-wide scale, they may emerge within very specific user sub-groups once the broader marine resource guidelines and hierarchies are established through governmental processes. Co-operative common property resource management appears to be most viable for: 1) subcomponents within marine resource users, such as a localized group of fishermen targeting one resource (e.g., lobstermen based on a particular fairly remote island); 2) consumable resources such as fish stocks, rather than more intangible values such as fish and wildlife habitat; and 3) vulnerable resources such as mobile stocks ranging over vast territory, where compliance with centralized regulations is difficult to monitor and enforce, and where a management scheme developed and accepted by the

would argue that general public values, rather than the self-interest of commodity users, should guide state policy. See Michael C. Blumm, *Public Choice Theory and the Public Lands: Why 'Multiple Use' Failed*, 18 HARV. ENVTL. L. REV. 405 (1994).

22. OSTROM, *supra* note 16, at 14.

23. The selection of a management strategy for a particular resource will depend on many factors including the amount of pressure on the resource, the degree of mobility of the resource, the degree to which enforcement will be dependent upon the goodwill and consent of the regulated, and whether private property rights are administratively feasible or politically acceptable. R. Bruce Rettig et al., *supra* note 20, at 273. Relatively immobile resources like a particular submerged lands site, clams, oysters, or fish that stay in a limited area are theoretically amenable to management by the allocation of property rights. Mobile stocks may be significantly less amenable to management through a property rights system; if there are significant barriers to governmental policing and enforcement over large areas, the need for particular user groups to cooperate in implementation of a management system may make a co-management approach more appropriate for that particular resource.

24. See Pinkerton, *supra* note 19.

user group may enhance compliance. Co-operative management is not likely to make a unique contribution to management of non-transient uses, such as aquaculture facilities or permanent structures on submerged lands. For these permanent uses, policing and enforcement are not particularly difficult, and compliance is not dependent upon the consent of the governed.

The other approach to management of a common resource is through increased privatization. Throughout the history of American public land law, various interests have continued to debate whether the public interest will be best served by grants or other dispositions to private interests, or by continued public ownership and management.²⁵ In theory, privatization provides a common benefit by giving individuals incentives to improve land for more productive use. The individual is granted permission to make improvements on public lands and is, in turn, protected from having to share that investment with other users without compensation.

No individual is likely to invest in a marine resource project unless that individual has reasonably long term control over such a project and has the right to exclude others. Governmental transfer of a property interest to the individual, such as through a long-term submerged lands lease, can, in theory, advance the public interest by fostering improvement of the leased land which makes the remaining public submerged lands capable of more productive use.

However, privatization has come under increasing criticism, particularly based on the past failures of privatization for federally-owned western lands.²⁶ While the policy of "multiple use" behind privatization of federal lands seems neutral on its face, it is often criticized for being inherently biased in favor of self-interested commodity users.²⁷ Due to the dispropor

25. GEORGE CAMERON COGGINS AND CHARLES F. WILKINSON, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 58-61 (2d ed. 1987).

26. Blumm, *supra* note 21, at 406.

Laws which grant private property rights in water and mineral resources with little or no consideration of the public interest are a major cause of the enormous amount of environmental destruction in the West. In view of the immense social costs generated by the private rights systems that dominate Western water and mining law, it is unclear why anyone would ever call for privatization of the public lands.

Id.

27. *Id.* Blumm asserts that self-interested commodity users have the most incentive and the most success in advancing their economic well-being. The general public interest is inevitably sacrificed in the decision-making process due to the power of organized special interests to take advantage of the standardless delegation of authority to administrative

tionate ability of commodity users to influence agency decisions, the resulting governmental land management practices tend to protect the most remunerative resources, not the most vulnerable. This can be seen as inconsistent with the national public interest—the protection of indigenous fish and wildlife and ecologically vital watersheds.²⁸

While this analysis is often based on western federal terrestrial lands, the same type of dynamic may emerge in decision-making about state-owned aquatic lands. Certainly there is the same risk that interest groups of well-organized users could skew the process so that it favors protection of the most remunerative resources even if a legislative body has not made a conscious judgment about whether these resources have the most utility for the public.²⁹

4. *Existing Laws Inadequately Address Marine Conflict Resolution*

While there are currently numerous federal and state laws that regulate a multiplicity of activities in marine resources, they typically contribute little to conflict resolution.³⁰ Marine waters are typically regulated by multiple local, state and federal agencies, each with a narrow mandate to

agencies.

28. *Id.* at 431. Blumm asserts that the facial neutrality of multiple use concepts should be replaced with a positive mandate to administer public lands primarily for public purposes. This new standard would:

[E]mphasize the development of sustainable ecosystems and the simultaneous production of renewable resources that do not damage watersheds or fish and wildlife species. . . . Congress should make clear that sustained yield means sustained production of *all* resources over the long term, and that multiple use means simultaneous resource management, not the landscape of segregated dominant uses we see today.

Id. at 430.

29. One important legal difference between federal and state lands, however, is in the applicability of the public trust doctrine. Whether a federal common law public trust doctrine exists which is applicable to federal public lands is still a matter of considerable debate. See JACK H. ARCHER ET AL., *THE PUBLIC TRUST DOCTRINE AND THE MANAGEMENT OF AMERICA'S COASTS* 154-61 (1994). However, it is settled that the public trust doctrine does apply, with individual state variations, to state-owned submerged lands. *Id.* For those lands, the doctrine generally holds that the government may not convey public lands into private ownership if doing so would unduly interfere with the interest of the public in that resource. *Id.* The existence of this state common law doctrine makes it more compelling to use public utility as the yardstick for use and allocation decisions.

30. *But see* discussion *infra* Section IV regarding the emerging efforts of several leading states.

enforce one or more single purpose laws.³¹ This fragmented management of marine resources is typical of other states as well.

In the absence of formal governmental conflict resolution mechanisms such as explicit goals setting and listing a hierarchy of uses for marine waters, decisions are made on an ad hoc basis. These decisions can be through narrow amendments, single purpose laws, or through tradeoffs and compromises reached in disputes over particular development projects.³²

31. For example, a recent study for Maine found that twenty-eight state agencies spread across ten departments, three regional authorities, and nine federal agencies have a significant role in determining what use is made of Maine's marine waters. No single agency has been designated to develop a comprehensive state policy for the use of coastal waters, to develop criteria to resolve conflicts among different uses, or to coordinate the different agencies with marine responsibilities. JOHN CATENA *ET AL.*, POLICY OPTIONS FOR MAINE'S MARINE WATERS 47 (Maine Coastal Program 1992). *See also*, DONNA R. CHRISTIE, GOVERNOR'S OFFICE OF PLANNING AND BUDGETING, FLORIDA'S OCEAN FUTURE: TOWARD A STATE OCEAN POLICY 21-27 (1989); BILIANA CIGIN-SAIN *ET AL.*, NATIONAL COASTAL RESOURCES RESEARCH AND DEVELOPMENT INSTITUTE, IMPROVING OCEAN MANAGEMENT CAPACITY IN THE PACIFIC COAST REGION: STATE AND REGIONAL PERSPECTIVES 13-15 (1991); and RICHARD MCLAUGHLIN & LAURA S. HOWORTH, MISSISSIPPI-ALABAMA SEA GRANT LEGAL PROGRAM, MISSISSIPPI OCEAN POLICY STUDY 13.1 (1991).

32. For example, in the 1995 session, more than a dozen bills related to very specific marine use conflicts were introduced in Maine's Legislature; the policy-makers had to evaluate the proposed resource allocation adjustments without benefit of an overall plan for managing marine resources. *See* An Act to Impose a Moratorium on New Lobster and Crab Fishing Licenses and to Develop a Resource Management Plan for the Lobster Industry, L.D. 626, 117th Leg., 1st Reg. Sess. (Me. 1995); An Act to Establish a Management Framework for the Lobster Fishery within State Waters, L.D. 782, 117th Leg., 1st Reg. Sess. (Me. 1995) (limited entry and limit on number of traps); An Act Concerning Licensed Activities for Marine Worm Diggers, L.D. 570, 117th Leg., 1st Reg. Sess. (Me. 1995) (to restrict worm harvest in clam flats closed for conservation); An Act to Authorize Game Wardens to Enforce Prohibitions against Swimming in Navigable River Channels, L.D. 524, 117th Leg., 1st Reg. Sess. (Me. 1995) (giving ability to prohibit, through rulemaking, swimming in areas deemed to be hazardous); An Act to Restrict the Use of Motorboats and Personal Watercraft on Certain Bodies of Water, 117th Leg., L.D. 244, 1st Reg. Sess. (Me. 1995) (restricting motorboats and personal watercraft on certain inland waters); An Act to Repeal the Law that Prohibits Dragging and Scalping in the Frenchboro Area, L.D. 129, 117th Leg., 1st Reg. Sess. (Me. 1995); An Act to Impose Appropriate Fees and Restrictions to Prevent the Out-of-State Transport of Sea Cucumbers, L.D. 1101, 117th Leg., 1st Reg. Sess. (Me. 1995) (to protect the availability of sea cucumbers as a marine resource); An Act to Protect Near-shore Groundfish Spawning Areas, L.D. 1210, 117th Leg., 1st Reg. Sess. (Me. 1995) (prohibits all commercial harvesting of all marine organisms in cod, haddock or yellowtail flounder spawning areas during the spawning period); An Act to Amend the Law Regarding the Lease of Submerged Lands, L.D. 1404, 117th Leg., 1st Reg. Sess. (Me. 1995) (to repeal the submerged lands lease program and grant private and public entities facilitating public trust uses exclusive rights to submerged lands upon registration); An Act to Allow Municipalities to Grant Aquaculture Licenses for Sea Vegetables, L.D. 993, 117th Leg., 1st

In the face of growing intensity and complexity of use conflicts, this ad hoc approach is no longer sufficient to manage economically valuable, publicly-owned resources.

The development of a comprehensive management plan will not be easy. The 1980 federal study which projected greater ocean use conflicts postulated that if more interests were to be accommodated, certain changes would be required in the management programs in the future.³³ This study projected that, in the future, a structured ocean management or allocation system will be required to, at a minimum, prevent growing numbers of activities from interfering with each other or, at best, insure that new activities would be consistent with broader public interests.³⁴ Even with a more structured process, the study predicted decision-makers will still have to resolve fundamental issues such as "basic conflicts of interest, the finite nature of ocean space, [and] the sensitivities and limited carrying capacity of the ocean."³⁵ Finally, decisions would have to progress beyond "narrow or single purpose decisions" to "systems evaluation, seeking out impact networks, [and] long range cumulative implications."³⁶ While this particular study focused on federal ocean programs, its observations are applicable to state territorial sea management programs as well.

Thus, given a finite resource, the current challenge facing coastal policy makers is to restructure the marine resource management regime so that it is based upon a comprehensive, integrated set of policy objectives with clear processes to establish priorities among uses and criteria for resolving use conflicts. This requires readjusting the management focus, which has previously been set on the details of managing a particular sector or resource, to a broader focus encompassing the full complement of marine resources to assess options and make choices about how best to protect and use them from an ecosystem approach. Due to the complexity and entrenchment of many federal management institutions, readjusting the

Reg. Sess. (Me. 1995) (expands scope of municipal authority); An Act to Increase the Maximum Lease Size for Bottom Culture Aquaculture, L.D. 1511, 117th Leg., 1st Reg. Sess. (Me. 1995) (to increase the maximum lease area per person for bottom culture from 150 to 300 acres); An Act to Preserve Fishing Stocks, L.D. 1464, 117th Leg., 1st Reg. Sess. (Me. 1995) (to extend State marine resources laws out to 12-miles offshore); An Act to Change the Restricted Area around Aquaculture Pens from 500 to 300 Feet, L.D. 719, 117th Leg., 1st Reg. Sess. (Me. 1995) (to prohibit all harvesting of marine organisms within 300 feet of aquaculture equipment and increase penalties).

33. ARMSTRONG & RYNER, *supra* note 6, at 57.

34. *Id.*

35. *Id.*

36. *Id.*

focus to allow consideration of the “big picture” will require much more than fine-tuning existing laws; it may require a new approach. Coastal states and their subdivisions have significant roles to play in developing such holistic marine management plans.

II. COMPLEX INTERPLAY OF STATE AND FEDERAL LAWS

While asserting that states should exert more authority over submerged lands, it is important to recognize the federal government may impose some limits on state authority. Simply stated, but harder to detail, state and federal governments have “concurrent jurisdiction” over submerged lands, defined as those tidal lands extending out three geographic miles from the coastline.³⁷ Therefore, several entities may have jurisdiction over a particular aspect or resource within that zone. The precise limits of the authority of each agency are often controversial and complex, and, if litigated, may present the court with very fact-dependent questions of first impression.

Due to these unsettled issues, it may be more efficient for states to attempt to proceed in coordination with federal agencies than investing a lot of effort to determine precise jurisdictional limits.³⁸ However, more exact delineation of the precise boundaries of concurrent jurisdiction may be unavoidable if the state and federal governments have opposing interests.

The following section contains a very brief overview of the federal Submerged Lands Act, federal preemption, and related federal laws. It concludes with an illustration of how these issues interplay in the context of state and local efforts to regulate anchoring to address use conflicts.

A. *Submerged Lands Act*

The federal Submerged Lands Act of 1953³⁹ quitclaimed to the individual states “all right, title, and interest” to lands beneath navigable waters within state boundaries and to the natural resources within such lands and waters. Those lands extend seaward to a line at least three

37. 43 U.S.C. § 1312 (1994).

38. See THE OR. OCEAN RESOURCES MANAGEMENT TASK FORCE, OREGON’S OCEAN RESOURCES MANAGEMENT PLAN 178-89 (1991) (suggesting that the state should “assert the principle of jointly managing ocean resources and uses with the federal government” as a means to ensure ecologically sound decisions).

39. 43 U.S.C. §§ 1301-1315 (1994).

geographical miles from the coastline.⁴⁰ The natural resources covered by the Act include oil, gas, other minerals, marine animal and plant life, but specifically exclude water power or the use of water for the production of power.⁴¹ The grant to the states does specifically include the "right and power to manage, administer, lease, develop and use the said lands and natural resources all in accordance with applicable State law."⁴²

However, the federal government retained control of these lands and waters for purposes of navigation, flood control, or the production of power.⁴³ The United States also expressly retained:

[A]ll its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to . . . rights of ownership . . . or management . . . assigned to the respective States.⁴⁴

In addition, the Act confirmed the rights of the United States to the lands and resources seaward of three miles.⁴⁵

B. Federal Preemption and Related Federal Laws

By confirming state ownership but reserving other rights to the federal government, the Submerged Lands Act sets up a management system that will inevitably require a determination of whether the reserved federal rights prevent the state from regulating particular resources. The judicial doctrine of federal preemption will guide this determination.

Reviewing courts generally start with a presumption that state police powers are not superseded by federal law "unless that was the clear and manifest purpose of Congress."⁴⁶ The court may find that the state law is preempted if: 1) Congress implicitly occupies the field through pervasive regulation that leaves no room for the States to supplement it; or 2) there

40. *Id.* § 1312.

41. *Id.* § 1301(e).

42. *Id.* § 1311(a)(2).

43. *Id.* § 1311(d).

44. *Id.* § 1314(a).

45. *Id.* § 1332.

46. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1950).

is an actual conflict between federal law and state regulation, preempting the state regulation.⁴⁷

The preemption argument can be advanced on the basis of the powers such as regulation of commerce, navigation, and national defense which were expressly retained by the federal government pursuant to the Submerged Lands Act,⁴⁸ or on the basis of a conflict with federal laws or regulations subsequently adopted in furtherance of those reserved interests.⁴⁹ Few of these laws are broadly applicable to management of the coastal system. Most are applicable only to a single purpose, a single resource or a single use.⁵⁰ These laws generally focus on a particular activity such as oil spills, navigational patterns, pollution, or protection of marine mammals; however they exert control regardless of the location, thus they indirectly influence the use of a states' marine waters.⁵¹

47. *Beveridge v. Lewis*, 939 F.2d 859, 861 (9th Cir. 1991).

48. *See Hawaiian Navigable Waters Preservation Soc'y v. Hawaii*, 823 F. Supp. 766 (D. Haw. 1993) (state regulations on anchoring and mooring in state waters were not preempted by the federal reservation of power over navigation in the Submerged Lands Act).

49. THE RESOURCES AGENCY OF CAL., CALIFORNIA'S OCEAN RESOURCES: AN AGENDA FOR THE FUTURE app. E (draft 1995) (identifying forty-five federal statutes that pertain to the regulation or management of coastal or ocean resources).

50. According to one coastal expert, before 1970, the only real management of coastal and ocean waters was done by the states, but such management was very limited. The exception was offshore oil and gas, where management was divided between the state and federal governments by the passage of the Submerged Lands Act and the Outer Continental Shelf Lands Act in 1953. During the 1970s, the federal government took a more active role, passing about a dozen major federal laws on ocean resources and space, but these laws generally regulated only a single purpose, use, or resource. CICIN-SAIN et al., *supra* note 31, at 1-2.

51. The federal laws with the most impact on state-owned marine waters include (the following list adapted from OR. POLICY ADVISORY COUNCIL, STATE OF OREGON TERRITORIAL SEA PLAN 19-23 (1994)): Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C.A. §§ 1251-1387 (1986 & Supp. 1995); Coastal Zone Management Act (CZMA), 16 U.S.C. §§ 1451-1464 (1994); Comprehensive Environmental Response Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §§ 9601-9675 (1994); Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1994); Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), 16 U.S.C.A. §§ 1801-1883 (1995 & Supp. 1997); Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1421h (1994); Marine Plastics Pollution Research and Control Act of 1987, 33 U.S.C.A. §§ 1901-1912 (1986 & Supp. 1995); Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431-1445a (1994); Migratory Bird Treaty Act of 1918, 16 U.S.C. §§ 703-712 (1994); National Environmental Policy Act (NEPA), 42 U.S.C.A. §§ 4321-4347 (1994); National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd-668ee (1994); Ocean Dumping Act, 33 U.S.C.A. §§ 1401-1445 (1986 & Supp. 1995); Oil Pollution Act (OPA) of 1990, 33 U.S.C.A. §§ 2701-2761 (1986 & Supp. 1995); Rivers and Harbors Act of 1899,

In counterbalancing a federal preemption argument, courts also consider the fact that the federal government has endorsed state and local management of state waters out to three miles. The Coastal Zone Management Act (CZMA) of 1972 articulates as its major premise that "[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone."⁵² The primary incentives for state participation in the program were twofold: federal financial assistance for plan development and implementation, and a prospect of influencing federal actions through federal consistency requirements.⁵³ Congress, in enacting the CZMA, expected states to plan and manage for the development of the states' coastal resources using existing state authority to implement land use and water use programs for the coastal zone.⁵⁴

To be eligible for continuing financial support, a state coastal plan must include "broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority" and a "definition of . . . permissible land and water uses within the zone which have a direct and significant impact on the coastal waters."⁵⁵ In addition, the state or its subdivisions must have authority to utilize land and water use regulations, control development, and resolve conflicts among competing uses.⁵⁶

Congressional intent was not to limit state management to land or land/water areas of interaction. Congress envisioned that states would control the development of submerged lands and exert police power authority over land and water uses in the entire coastal zone.⁵⁷ This vision

33 U.S.C.A. §§ 401-413 (1986 & Supp. 1995); and Submerged Lands Act of 1953, 43 U.S.C. §§ 1301-1315 (1988). *Adapted from* OR. POLICY ADVISORY COUNCIL, STATE OF OREGON TERRITORIAL SEA PLAN 19-23 (1994). See also THE RESOURCES AGENCY OF CAL., *supra* note 49, at app. E, for a more inclusive list of laws affecting coastal waters within and beyond three miles.

52. 16 U.S.C. § 1451(i).

53. The federal consistency provisions of the CZMA allow states with approved coastal programs to influence federal actions. 16 U.S.C. § 1456(c)(1)(A) (1994). The provisions vary slightly depending upon whether the proposed action is a direct federal activity or development project, a federally licensed or permitted activity, or involves federal assistance to state and local governments.

54. See 15 C.F.R. § 923.32(b) (1989).

55. 16 U.S.C. § 1455(d)(2)(B),(E).

56. 16 U.S.C. § 1455(d)(10)(A).

57. There has been some controversy about whether the Presidential Proclamation of December 27, 1988, Proclamation No. 5928, *reprinted in* 3 C.F.R. at 547 (1989), extending the U.S. territorial sea from three to twelve nautical miles for international purposes, had the effect of extending the coverage of the Coastal Zone Management Act. The Department of

included the power to control development of submerged lands, power to resolve conflicts between submerged lands development and competing water uses, and power to regulate water uses of submerged lands.⁵⁸ The intent for states to manage water resources was confirmed in the 1990 amendments to the CZMA.⁵⁹ Contrary to this intent, to date, most states have emphasized land-side shoreline management to the exclusion of water-related planning.⁶⁰ However, this federal exhortation to use the states' "full authority" in management, while somewhat circular, should weigh in favor of state management in federal preemption decisions.

Federal preemption analysis is necessarily fact-specific. If there are no federal regulations which address use priorities or impose restrictions on a particular type of use, courts will likely allow a state to use its police powers to impose regulations it deems appropriate. If such state regulations are adopted in conformance with required due process procedures, they will be evaluated using a rational basis test.⁶¹

Justice and Office of the General Counsel of NOAA concluded that it did not extend the coverage of the CZMA nor did it enlarge the area to which the consistency provisions of the CZMA apply. Douglas W. Kmiec, *Legal Issues Raised by the Proposed Proclamation to Extend the Territorial Sea*, 1 TERR. SEA J. 1, 37 (1990); Opinion of the Office of General Counsel, NOAA, *Effect of the Territorial Sea Proclamation on the Coastal Zone Management Act*, 1 TERR. SEA J. 169, 190 (1990). But see, John A. Saurenman, *The Effects of a Twelve Mile Territorial Sea on Coastal State Jurisdiction: Where Do Matters Stand?* 1 TERR. SEA J. 39 (1990).

58. Opinion of the Office of General Counsel, NOAA, *supra* note 57, at 175.

59. The 1990 amendments to the Coastal Zone Management Act of 1972 (Coastal Zone Act Reauthorization Amendments of 1990, P.L. 101-508) established the Coastal Zone Enhancement Grants Program to encourage states to strengthen federally-approved coastal management programs in eight areas, one of which was "planning for the use of ocean resources." 16 U.S.C. § 1456b (1994). However, of seventy-three projects funded to address priority issues, only three addressed the ocean resources issue (Massachusetts, North Carolina, and Oregon). Ocean resource planning was also identified as a priority in American Samoa, California and Hawaii, but was not funded or no funding was requested. Tina Bernd-Cohen et al., *Review of the Section 309 Coastal States Enhancement Grants Program*, 23 COASTAL MGMT. 173, 182 (1995).

60. Bernd-Cohen, *supra* note 59, at 184-85.

61. For example, faced with growing use conflicts, Hawaii enacted a ban on the weekend and holiday use of commercial "thrill craft" in certain bays. In *Kaneohe Bay Cruises, Inc. v. Hirata*, 861 P.2d 1 (Haw. 1993), challengers argued that the state was preempted from instituting restrictions on these craft because 1) the federal government has not put any use restrictions on the waters of the particular bay so the state is also preempted from doing so, and 2) federal law preempts the field of required performance standards for safety equipment in recreational vessels, so the state is precluded from restricting commercial thrill craft operations in the bay. *Id.* at 9. The court rejected both arguments as non-sequiturs, stating that the fact that the federal government has not itself chosen to

C. Example: Federal Preemption and Restrictions on Anchoring

State and local governments increasingly regulate boat anchoring due to conflicts with natural resource harvesters, commercial fishermen, environmentalists, and shorefront residents.⁶² Boaters have challenged the authority of state and local governments to regulate vessel anchorage on public submerged lands, asserting federal preemption, the supremacy of federal law in the field of navigation, and the insufficiency of state delegation to local entities.⁶³

In Florida, numerous communities, driven primarily by shorefront landowners, have adopted local anchoring restrictions. Some ban anchoring outright, while others impose anchorage limits as short as twelve to

impose restrictions does not mean that the state cannot opt to do so; the field is left open for the state to "legitimately exercise its own inherent police power in this area." *Id.* The court stated that federal preemption is more likely if there is a pervasive scheme of federal regulation which leaves no room for the states to supplement it, or if the federal interest is so dominant that it appears to preclude enforcement of state laws on the same subject, or if the state and federal laws are inconsistent, making the state statute void to the extent of the conflict. *Id.* However, it should be noted that even if federal preemption does not preclude state or local regulation, other legal principles may prevent state or local bans on particular types of vessels. *See Buckley v. City of Redding*, No. 93-17277, 66 F.3d 188, 1995 U.S. App. LEXIS 33286 (9th Cir. Sept. 13, 1995) (ban on personal watercraft was struck down on contractual grounds). *But see Personal Watercraft Indus. Ass'n v. Department of Commerce*, 48 F.3d 540 (D.C. Cir. 1995) (regulation limiting the use of personal watercraft on waters of the Monterey Bay National Marine Sanctuary was upheld as it was permissible to single out personal watercraft from other kinds of vessels because of their heightened threat to resources due to the small size, maneuverability and high speed). *See also Atlantic Prince Ltd. v. Jorling*, 710 F. Supp. 893 (E.D.N.Y. 1989) (New York was enjoined from enforcing a statute prohibiting boats longer than 90 feet from fishing in New York coastal waters when the court held that it was discriminatory in practical effect). *But see Davrod Corp. v. Coates*, 971 F.2d 778 (1st Cir. 1992) (court upheld a Massachusetts law imposing a 90-foot length restriction on fishing vessels which applied to all vessels wherever berthed).

62. New regulations have been spawned by a variety of issues including privacy demands of shorefront residents; public health concerns about long-term live-aboards; and natural resource, habitat, water quality and other environmental concerns. The legal issues vary in accordance with the functions and values the regulations are designed to protect.

63. While full discussion is beyond the scope of this inquiry, these local anchoring restrictions also raise questions about the legal adequacy of the public purpose used to justify restrictions on anchoring and navigation. Such public purposes have included aesthetic sensitivities and privacy concerns of shorefront landowners; the desires of cruising boat owners for a "wilderness experience; habitat and water quality concerns (e.g., to protect shellfish beds, submerged vegetation); protection of endangered and/or threatened species; equitable use of submerged lands by different users; and public health and safety, including minimizing hazards to navigation.

seventy-two hours.⁶⁴ To achieve some uniformity, Florida is considering enacting state guidelines which would preclude local governments from adopting more restrictive standards and would invalidate existing, more restrictive anchoring laws.⁶⁵

In California, motivated at least in part by public health concerns, and armed with special enabling legislation and extensive comprehensive plans, San Diego Bay's Unified Port District designated certain areas for mooring and anchoring boats, and prohibited anchoring-at-will in the rest of the bay. This action, which was carefully coordinated with the United States Coast Guard, but still hotly contested by long-term, live-aboard occupants, survived court challenge in 1992.⁶⁶

Similarly, the State of Hawaii banned all anchoring and mooring within ocean waters or navigable streams of the state without the possession of a permit from the Department of Land and Natural Resources.⁶⁷ Focusing on issues of federal preemption, the United States District Court upheld Hawaii's regulations in 1993, finding that states have concurrent authority with the federal government and may adopt state regulations so long as they do not conflict with Coast Guard regulations.⁶⁸

64. See Charles E. Heckler et al., *Boaters Seeking Firm Anchorage*, MIAMI HERALD, July 4, 1993, at 1B (Miami Shores and Indian Creek prohibit anchoring, Fort Lauderdale imposes a 24-hour limit on anchoring); Naftali Bendavid, *St. Lucie to Boat Owners: Bon Voyage*, MIAMI HERALD, Aug. 22, 1990, at 1B (St. Lucie County Commissioners prohibit boat anchoring more than 14 days a month in County waters on penalty of 60 days in jail and \$500 fine; Longboat Key forbids mooring more than 48 straight hours; and Vero Beach forbids overnight anchoring outside marinas); Scott Benarde, *Local Laws Restrict Live-Aboards*, PALM BEACH POST, Oct. 9, 1990, at 4D (town of Jupiter restricts anchoring to 96 continuous hours, Fort Pierce only allows mooring for 72 hours a month outside marinas, and Riviera Beach requires a permit, valid for up to 7 days, to anchor in its harbor, and may impound a boat without a permit anchored in its harbor for more than 24 hours).

65. *Uniform Anchoring Guidelines Make Headway*, BOAT/U.S. REP., Nov. 1993, at 1.

66. *Graf v. San Diego Unified Port Dist.*, 7 Cal. App. 4th 1224 (Cal. Ct. App. 1992).

67. HAW. REV. STAT. § 200-6 (1993). The statute does not apply to vessels owned by the United States, vessels engaged in interstate or foreign commerce, or pleasure craft or fishing vessels temporarily anchored for a period of less than 72 hours.

68. *Hawaiian Navigable Waters Preservation Soc'y v. Hawaii*, 823 F. Supp. 766 (D. Haw. 1993). In this case, a boaters' association challenged the constitutionality of all state regulations and legislation affecting the rights of boaters to anchor and navigate in ocean waters surrounding the islands of Hawaii. Plaintiffs argued that federal government had explicitly and implicitly preempted Hawaii's regulations by the federal Submerged Lands Act, federal laws on special anchorage grounds, and federal safety regulations. The court rejected the preemption claim, explaining that it started with an assumption that state police powers are not superseded by federal law unless that was the "clear and manifest purpose

However, in a decision rejecting the validity of a local regulation, a Florida appeals court judge recently overturned a criminal trespass conviction of a boater who refused to comply with a local anchoring restriction which banned nighttime anchoring.⁶⁹ Giving the boater's "federally protected rights to anchor" priority over the local regulation, the court reportedly held that the state was unable to show that the regulation was rational, necessary, and supported by sufficient competent evidence, as required to support a state police power restriction on a federally protected right to navigate.⁷⁰

In connection with this growing anchoring controversy in Florida and elsewhere, the U.S. Coast Guard issued a legal opinion concluding that there is no "clearly preemptive federal regulatory scheme" so "states may regulate anchoring on waters under their jurisdiction."⁷¹ Those state regulations would be permissible so long as they are not in conflict with federal law. They would be impermissible only if the state regulation is in actual conflict with a federal statute or if the state regulation unduly burdens interstate commerce.⁷² The Coast Guard has indicated that its

of Congress." Relying on U.S. Supreme Court cases, the district court determined that the implicit preemption could be found if: 1) Congress implicitly occupies the field through pervasive regulation that leaves no room for the States to supplement it; or 2) the federal interest is so dominant that it is assumed to preclude the enforcement of state laws on the same subject; or 3) there is an actual conflict between federal law and local regulation, preempting the local regulation. The court found that in the Submerged Lands Act, Congress retained only concurrent, not exclusive, jurisdiction over navigable waters of the states. Similarly, there was no actual conflict between state and federal regulations, including those establishing a "special federal anchorage." Because Congress did not intend to occupy the entire field of navigation and there was no actual conflict between state and federal law, the court held the state laws were not preempted by federal law.

69. *Judge Throws Out Anchoring Restriction*, BOAT/U.S. REP., Jan. 1994, at 3. The operator of a sailboat refused to comply with a state park policy that allowed daytime anchoring but prohibited nighttime anchoring.

70. *Id.*

71. Memorandum from Chief Counsel P.E. Versaw, United States Coast Guard to Chief, Office of Navigation Safety and Waterways Services (Jan. 7, 1993) (on file with the *Ocean and Coastal Law Journal*).

72. Memorandum from Acting Chief R.A. Knee, Maritime and International Law Division, United States Coast Guard to Chief Counsel, P.E. Versaw, United States Coast Guard (Dec. 30, 1992) (on file with the *Ocean and Coastal Law Journal*). Except for one case in which the township conceded that it could not pass a total prohibition on temporary mooring or temporary anchoring of floating homes within the jurisdiction, the Coast Guard analysis found no cases in which state or local regulations affecting the right to anchor had been invalidated under the Commerce Clause. *Id.* at 6 (citing *Bass River Assocs. v. Mayor of Bass River Township*, 743 F.2d 159 (3rd Cir. 1984) (in which a ban on permanent

primary concerns are that navigation safety not be compromised and that commerce not be unduly restricted. The Coast Guard indicated that it will leave it to individual boaters to raise claims of undue infringement on the right of navigation.⁷³

As illustrated by these cases, while the interplay of state and federal authority can be complex, within very broad parameters imposed by federally reserved rights in states-owned lands, states and their subdivisions have a great deal of flexibility to manage uses and minimize conflicts in states' coastal waters. State and local governments are just beginning to test the limits of this authority. Further, it may be possible for state and local governments to minimize federal preemption questions by coordinating with federal agencies prior to adoption of regulations.

floating homes was upheld). Courts might construe narrow restrictions on vessel anchoring, including durational limits, to be an unreasonable restriction on the right of navigation, but there is little case law on point. *Id.* at 7. Regardless, a total bar on passage through navigable waters is impermissible.

73. Letter from J.W. Kime, Admiral, Commandant, U.S. Coast Guard to Michael Sciulla, Vice President, Boat Owners Ass'n of the United States (Jan. 19, 1993) (on file with the *Ocean and Coastal Law Journal*). After reviewing inherent state police power, federal preemption, the Coastal Zone Management Act and when state regulation affecting interstate commerce is permissible, Kime concludes:

[S]tates do have the authority to enact anchorage regulations as long as their regulation does not actually conflict with Federal law. The Coast Guard designates special anchorage areas, usually at the request of local municipalities, solely for the purpose of exempting vessels of less than 65 feet from the federal requirements of exhibiting anchor lights and sounding signals while anchored in the designated anchorage area. Concurrent state or local regulation within these areas has been a long-standing practice which the Coast Guard has encouraged and one that the courts have upheld. The Coast Guard's primary concern regarding anchoring is that navigation safety is not compromised and commerce is not restricted.

...

The status of state anchorage regulations as an undue infringement upon the right of navigation has not been clearly determined by case law and is a question more properly directed at the courts by individual boaters. Our nation's waterways serve a multitude of competing interests. As these waterways become more congested and environmental resources threatened, coordinating this multiple use becomes imperative. How to manage waterway use to preserve and enhance navigability is a question that cannot be answered solely at the Federal level.

Id. at 2-3.

III. STATE AND LOCAL MARINE USE CONFLICT RESOLUTION FRAMEWORK: MAINE CASE STUDY

Any marine conflict resolution strategy will have to address two over-arching difficulties: the uncoordinated, single issue approach typical of existing marine resource regulation and management; and, the complex split between federal and state jurisdiction. State policy makers will also have to consider: 1) whether the state already has a policy designating marine use priorities; 2) how the state/local division of authority will affect decision making for coastal waters; and 3) whether state mechanisms and institutions exist which are capable of resolving conflicts and implementing decisions about use priorities for coastal waters.

These three factors vary from state to state and can only be analyzed within the context of a specific state. The State of Maine seems to be fairly typical of coastal states which have recognized the problem of increasing use conflicts but have not yet taken concrete steps to rectify the situation.

A. Background

Maine is heavily dependent on its coastal and ocean resources for its cultural identity and economic well-being. Approximately two-thirds of Maine's residents live in coastal communities.⁷⁴ A study of the economic value of Maine's coastal zone estimates that in 1985, 34.3% of the State's share of the GNP was attributable to coast related activities.⁷⁵

In Maine, as in other coastal states, use conflicts are increasing. A 1992 report by the Marine Policy Committee of the Land and Water Resources Council⁷⁶ found that intensifying use of the state's marine waters

74. ME. STATE PLANNING OFFICE, THE COASTAL ZONE MANAGEMENT ACT: A RESOURCE BOOK FROM MAINE 7 (1995).

75. CTR. FOR URBAN AND REG'L STUDIES, *supra* note 8, at 18. Coastal GNP is composed of "coast-dependent activities" such as water-dependent uses, "coast-linked activities" like fish processing and marine equipment suppliers, and "coastal service activities" including economic activities that are located in the coastal zone. *Id.*

76. The Marine Policy Committee of the Land and Water Resources Council is a subcommittee composed of the heads of relevant State agencies or their designees. It was established in 1991 to facilitate information exchange among agencies, to identify issues of concern, and develop necessary marine policies. The 1992 report analyzed the increasing level of use of Maine's coastal waters, inventoried the marine involvement of 144 coastal towns, 28 state agencies and 16 federal agencies, and identified management issues. CATENA ET AL., *supra* note 31, at 62, 68.

is threatening productivity and posing important and complex management challenges:

In some regions of the state it is becoming increasingly difficult to accommodate these multiple—and often—conflicting uses and protect the marine environment. In addition, as the uses of the marine environment increase and problems become more complex, coordination among the numerous state and federal agencies becomes more critical, yet more problematic.⁷⁷

However, despite the importance of Maine's marine waters, like many other coastal states, Maine has not been aggressive in planning for or managing the use of state waters. The 1992 study found there is no comprehensive planning and no comprehensive policy for the use of Maine's coastal waters.⁷⁸ In addition, the study found the state is greatly

77. *Id.* at i.

78. A review of the Maine state laws most applicable to submerged lands supports this conclusion about a lack of a comprehensive management scheme. Relevant laws include: The Protection and Improvement of Waters Act, ME. REV. STAT. ANN. tit. 38, §§ 361-372, 411-424, 451-452, 464-470 (West 1989 & Supp. 1994) (dividing Maine's estuarine and marine waters into three classifications, SA, SB and SC, and setting allowable standards for discharges); the Site Location of Development Law, ME. REV. STAT. ANN. tit. 38, §§ 481-490J (West 1989 & Supp. 1994) (providing for state review of developments likely to substantially affect the local environment); the Mandatory Shoreland Zoning Law, ME. REV. STAT. ANN. tit. 38, §§ 435-449 (West 1989 & Supp. 1994) (requiring municipalities to regulate shoreland development consistent with mandatory minimum standards); the Land Use Regulation Law, ME. REV. STAT. ANN. tit. 12, §§ 681-689 (West 1994) and Land Use Regulatory Commission Rules and Regulations, Ch. 10 as of May, 1990 (reviewing land-side development in unorganized and deorganized townships including some coastal islands); the Natural Resources Protection Act, ME. REV. STAT. ANN. tit. 38, §§ 480-A - 480-V (West 1989 & Supp. 1994) (requiring permits for activities that may adversely affect listed resources of state significance, including "coastal wetlands" (defined as all tidal and *subtidal* lands)); the Oil Discharge Prevention & Pollution Control Law, ME. REV. STAT. ANN. tit. 38, §§ 541-560 (West 1989 & Supp. 1994) (promoting immediate cleanup of oil spills and speedy settlement of third-party claims); the Marine Resources Law, ME. REV. STAT. ANN. tit. 12, §§ 6001-6956 (West 1994 & Supp. 1994) (allowing the Commissioner of the Department of Marine Resources, with advice and consent of advisory council, to adopt regulations to promote the conservation and propagation of marine organisms and to prevent gear conflicts among harvesters of marine organisms, accommodating the needs of all interested parties to the maximum extent possible); the Coastal Management Policies Act, ME. REV. STAT. ANN. tit. 38, §§ 1801-1803 (West 1989) (directing state, local, and certain federal agencies to conduct their activities consistent with nine policies relevant to marine waters); the Submerged Lands Act, ME. REV. STAT. ANN. tit. 12, § 558-A (West 1994) (giving the Bureau of Public Lands of the Department of Conservation the power to grant leases and charge rent for permanent uses occupying state owned submerged and intertidal

hampered in resolving conflicts among competing uses because it lacks priority-setting criteria and adequate information about the marine ecosystem. There is also inadequate coordination among local, state, and federal agencies, each of which is responsible for managing discrete aspects affecting the use of marine waters.⁷⁹

The 1992 report concludes that to adequately plan for and manage its marine environment, the state of Maine needs a comprehensive multiple-use policy for submerged lands, a unified state-wide agenda or plan, and an improved institutional arrangement to coordinate policy, planning and management in the marine environment.⁸⁰

While this report has stimulated some discussion among Maine regulators, due to the primacy of other issues, the momentum for action seems to have flagged. However, given steadily increasing use, at some time the state will be forced to refocus its attention on management of its marine waters. The following assessment of articulated priorities, division of authority between state and local governments, and institutional readiness provides additional analysis for such a continuing discussion.

B. Maine's Policy on Marine Resource Priorities

A basic starting point for approaching use conflict resolution is to examine the extent to which the State of Maine already has policies which establish marine resource priorities. The primary vehicles for establishing such a hierarchy are the state's public trust doctrine, its submerged lands leasing laws, and its coastal management policies.

1. Public Trust Doctrine

The "public trust doctrine," a set of principles embodied in American property law, generally holds that all tidelands and lands under navigable waters are owned by the states, subject to a "public trust" for the benefit of all their citizens for certain rights of usage.⁸¹ The precise scope of the

lands for terms of up to thirty years if it will not unreasonably interfere with public rights to the intertidal or submerged lands and the waters above those lands).

79. CATENA, ET AL., *supra* note 31, at ii-iii.

80. *Id.*

81. The public trust doctrine, as an expression of societal values and priorities, can be used to measure whether the state legislature and its agencies have complied with their constitutional responsibility to act only for the benefit of the general public. The doctrine can be used to construe the intent of legislation pertaining to submerged lands, and to define

doctrine varies from state to state.⁸² Recognized rights of usage traditionally include maritime commerce, navigation and fishing,⁸³ and related activities within the scope of those terms. However, in some states, the doctrine has evolved to include other uses as well, such as recreation and environmental conservation.⁸⁴

During the last several years, the coastal management legal community has revisited the public trust doctrine to gauge its utility to help resolve use conflicts in, on, or over submerged lands.⁸⁵ One important question is

the parameters of grants of authority to municipalities and state agencies. Mitchell M. Tannenbaum, *The Public Trust Doctrine in Maine's Submerged Lands: Public Rights, State Obligation and the Role of the Courts*, 37 ME. L. REV. 105, 107, 151 (1985).

82. All states entered the Union on "equal footing" with the original thirteen colonies, thus had complete power over their public trust lands. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472 (1988). The state's powers were subject only to the federal government's superior power, enumerated in the Constitution, over commerce, navigation, and treaty. Upon entering the Union, each state had the power to regulate the coastal lands and waters within their boundaries, limited by these specific federal powers. Within the broad parameters, individual states had the authority to modify their public trust law by, for example, limiting the geographic scope, extinguishing state rights, making grants to private individuals, or altering the definition of public trust uses. Over time, various states, through their legislatures and courts, have used this power so that significant differences now exist among states. Thus, to analyze the conflict resolution potential of the public trust doctrine in any detail, it is necessary to do so within the context of a specific state.

83. See *Shively v. Bowlby*, 152 U.S. 1, 11 (1894) (natural and primary uses public for navigation, commerce and fishing).

84. As a common law doctrine, courts have generally held that they are not bound to a fixed standard; the definition of public rights under the public trust doctrine may evolve with needs. In addition to navigation, commerce, and fisheries, public trust uses have been held to include "the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes" and "the preservation of those lands in their natural state . . . for scientific study, as open space," bird and marine habitat and visual and climate benefits. *Marks v. Whitney*, 491 P.2d 374, 380 (Cal. 1971). See also *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972) (bathing, swimming and other shore activities evolving "to meet changing conditions and needs of the public it was created to benefit"); *Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc.* 671 P.2d 1085, 1088 (Idaho 1983) ("dynamic . . . concept . . . destined to expand with the development and recognition of new public uses"). The United States Supreme Court held that the public's interests should be broadly defined, and depending on state law may extend, for example, to fishing and shellfishing in non-navigable waters, bathing, swimming, recreation, mineral development or reclamation of land for urban expansion. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. at 482.

85. See Jack H. Archer & M. Casey Jarman, *Sovereign Rights and Responsibilities: Applying Public Trust Principles to the Management of EEZ Space and Resources*, 17 OCEAN & COASTAL MGMT. 253 (1992); Ralph W. Johnson, et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 WASH. L. REV. 521 (1992); Richard

whether the doctrine indicates which uses should be given priority over others. This would be relevant to the states' overall management goals and to individual leasing decisions. The answer, for most states, seems to be that the doctrine offers some very basic guidance on permissible and impermissible uses, but is of only marginal assistance in establishing priorities among uses.⁸⁶

Maine's public trust doctrine is less expansive than the doctrine of many other states, due in large part to its application to intertidal lands. In Maine, private ownership extends to mean low water. The Supreme Judicial Court of Maine has held that public use of privately-owned intertidal lands is limited to fishing, bird hunting, and navigation.⁸⁷ However, the same limitations do not apply to state-owned submerged lands.⁸⁸ For submerged lands, Maine's courts have indicated a willingness

G. Hildreth, *The Public Trust Doctrine and Coastal and Ocean Resources Management*, 8 J. ENVTL. L. & LITIG. 221 (1993).

86. See ARCHER ET AL., *supra* note 29; Marc J. Hershman, *A Word of Caution: The Public Trust Doctrine and Coastal Zone Management*, 8 J. ENVTL. L. & LITIG. 237 (1993). Questions also remain about integrating the public trust doctrine into regulatory reviews. Washington State has developed express guidance. Following two decisions which began to restore independent significance to the public trust doctrine (*Caminiti v. Boyle*, 732 P.2d 989 (Wash. 1987) and *Orion Corp. v. State*, 747 P.2d 1062 (Wash. 1987)), the Department of Ecology published a handbook for shoreline permit administrators on how to incorporate a public trust criterion into administrative reviews. The public trust review does not alter pre-existing administrative authority but "introduces a prevailing stewardship ethic through explicit investigation of the public trust doctrine." RALPH W. JOHNSON ET AL., *THE PUBLIC TRUST DOCTRINE HANDBOOK: A DESCRIPTION AND MODEL FOR WASHINGTON'S SHORELINE PERMIT ADMINISTRATORS*, 57 (1992).

87. In many states, intertidal lands, generally those lands between mean high water and mean low water, are owned by the state, just as submerged lands are state-owned. However, the minority position, applicable in Maine, Delaware, Massachusetts, and Pennsylvania holds that private ownership extends seaward to at least the mean low water mark. Maine's Law Court has indicated that the state does not own these intertidal lands, so it can not really be said to be the "trustee" of the public's rights in these intertidal lands; the public's rights are more in the nature of a public easement. *Bell v. Town of Wells*, 510 A.2d 509, 517 (1986). In subsequent litigation, the Law Court held that the scope of this public easement in Maine's intertidal lands is limited to those uses which were encompassed by the easement in 1820 when Maine's constitution "confirmed the grant of the intertidal land in fee to the upland owners and took over as the law of Maine the reserved public easement limited to fishing, fowling, and navigation." *Bell v. Town of Wells*, 557 A.2d 168, 176 (Me. 1989). Thus, public use of private intertidal lands is limited to only those uses recognized in 1820, excluding public uses that have evolved since that date.

88. In Maine, private ownership extends to mean low water, thus only submerged lands (and specific parcels of intertidal lands acquired by the state) are in public ownership. ME. REV. STAT. ANN. tit. 12, § 558-A (West 1994 & Supp. 1996-1997). Submerged lands

to extend the doctrine to include new uses which have emerged in response to changing societal needs.⁸⁹ While not completely settled, Maine's Law Court is likely to find that appropriate uses of submerged lands include not only fishing, fowling, and navigation, but also various forms of water-related commerce, recreation, and environmental conservation.

Maine's public trust doctrine imposes an important constitutional responsibility on the state as trustee to ensure that state-owned submerged lands, and waters over those lands, are used for the benefit of its citizens.⁹⁰ Similarly, the doctrine carries with it limitations on the State's ability to transfer an exclusive interest in those waters to private individuals.⁹¹ Public

are defined as those lands extending from mean low water (or from a point 1650 feet seaward of mean high water if that is closer to mean high water, such as might be the case in mud flats) out to the state's seaward boundary. *Id.* Maine's seaward boundary is generally assumed to be three nautical miles from shore. Bureau of Pub. Lands, Submerged Lands Rules § 1.4(S) (1992).

89. For example, in upholding a claim for recreational navigation which had been precluded by a commercial logging obstruction of a nontidal river, the court noted that the traditional use of the river for driving and storing logs may become secondary in importance to the use of the river for travel and recreation. *Smart v. Aroostook Lumber Co.*, 68 A. 527, 533 (1907). See also Opinion of the Justices, 437 A.2d 597, 607 (Me. 1981) (in which the court stated traditional uses of navigation, fishing, and fowling remain important, but other uses, such as recreation, have grown up as well).

The legislature has also addressed an evolving public trust. In 1969, as part of Maine's Oil Discharge Prevention and Pollution Control Act, the legislature declared that the "highest and best uses of the seacoast of the State," presumably including waters as well as coastal lands, are:

[P]ublic and private recreation and solace from the pressures of an industrialized society, and as a source of public use and private commerce in fishing, lobstering and gathering other marine life used and useful in food production and other commercial activities.

....

And that such uses can only be served effectively by maintaining the coastal waters, estuaries, tidal flats, beaches and public lands adjoining the seacoast in as close to a pristine condition as possible taking into account multiple use accommodations necessary to provide the broadest possible promotion of public and private interests with the least possible conflicts in such diverse uses.

38 Me. Rev. Stat. Ann. tit. 38, § 541 (West 1994). Interestingly, this declaration adds recreation, solace from the pressures of an industrialized society, and marine environmental protection to the public trust uses of fishing, fowling, and navigation traditionally recognized at that time. While the substantive provisions of the Act are confined to regulating the discharge of oil within the state, the findings are instructive.

90. Opinion of the Justices, 437 A.2d 597, 606 (Me. 1981); Op. Att'y Gen. No. 82-33 (June 2, 1982).

91. The limits on the transfer of an exclusive interest in those waters to private individuals is relatively clear: the state, through its agencies, may only authorize a private

trust concepts have been invoked in individual cases when the judiciary was called upon to resolve fact-specific disputes between conflicting uses.⁹² However, the judiciary has properly refrained from developing any more comprehensive formulation of priorities. Thus, in Maine, as in other states, the public trust doctrine and interpretive case law provides little substantive guidance on hierarchies within the broad range of public trust uses.

The public trust doctrine can be further defined through legislative enactments, so long as they are consistent with the basic doctrine. A few Maine laws and regulations, discussed immediately below, provide more detailed articulation of the state's public trust doctrine.

2. *Submerged Lands in Maine*

The regulation of submerged lands in Maine was consolidated in 1975 under the Bureau of Public Lands (BPL) in the Department of Conservation.⁹³ The BPL was given the responsibility for control and management of submerged and state-owned intertidal lands.⁹⁴ This consolidated responsibility supplemented scattered laws which had previously given other state agencies or municipalities the authority to regulate specific activities on submerged lands.⁹⁵

entity to make exclusive use of submerged lands, such as through a grant, lease or easement, if the authorization is reasonable, for the benefit of the people, and not repugnant to any other provision of the Maine or United States Constitution. Opinion of the Justices, 437 A.2d 597 (Me. 1981). Typically this involves a balancing of factors including the percentage of trust land conveyed, the type of interest granted to the private party (lease or fee), the character of the grantee, how the land will be used, and whether there will be continued public use or other public benefits. Tannenbaum, *supra* note 81, at 142-43.

92. For example, in an 1887 case interpreting the public trust doctrine, Maine's Law Court found that it did have the authority to rule on the priority of established but conflicting public uses because the legislature had not acted. *Woodman v. Pitman*, 10 A. 321 (Me. 1887). It reached a decision favoring one use, harvesting ice, over another, travel by horse teams on a frozen river, holding that the commercial benefit of the former was more important to the public, taking into consideration changing circumstances and relative benefits to the general public. It looked at local community benefit, stating that "common good of all must have a decisive weight on the question of individual enjoyment." *Id.* at 323.

93. P.L. 1975, ch. 339, § 6 (codified as amended at ME. REV. STAT. ANN. tit. 12, §§ 551-560 (West 1994 & Supp. 1997)).

94. ME. REV. STAT. ANN. tit. 12, § 552(1)(A).

95. *See, e.g., id.* § 549 (Maine Geologic Survey responsible for mineral development and mining in submerged lands); *Id.* § 6072 (Department of Marine Resources authority to lease submerged lands for research and aquaculture); *Id.* tit. 38, §§ 1021-1027 (West 1989 & Supp. 1996-1997) (wharves and weirs in intertidal and subtidal zones require municipal license).

The Act gives BPL the authority to convey public submerged lands to private applicants for exclusive, private use for a period of up to thirty years in exchange for a fee. The conveyance may take the form of an easement, standard lease, or dredging lease.⁹⁶ Such a conveyance is required before the applicant may dredge, fill, or erect permanent⁹⁷ structures such as marinas, piers, wharves, docks, pilings, restaurants, bridges, moorings, or similar structures on, in or over submerged lands. This state lease is subject to reserved federal rights.⁹⁸

The practical effect of the 1975 Act was, however, greatly limited by a "constructive easement" provision which granted all owners of then-existing "structures" on submerged and intertidal lands an automatic thirty-year exemption from state submerged lands reviews and lease fees. They could continue the prior existing use without the necessity of obtaining a lease or paying compensation to the State until 2005.⁹⁹

Rough projections indicate that more than eighty percent of structures located on, over or in state waters which would otherwise require a lease are currently operating under the thirty-year exemption.¹⁰⁰ Thus, while the

96. *Id.* tit. 12, § 551(1)(E) (West 1994 & Supp. 1996-1997).

97. "Permanent" is defined as occupying the lands during seven or more months per year. BUREAU OF PUB. LANDS, *supra* note 88, § 1.4(L) (1992) (citing ME. REV. STAT. ANN. tit. 12, § 558-A(1)(B) (West 1994 & Supp. 1996-1997)).

98. The interest created by the Submerged Lands Leasing Program remains subject to the reserved federal rights in state-owned coastal waters. In *Donnell v. United States*, 834 F. Supp. 19 (D. Me. 1993), a wharf owner challenged an order of the Army Corps of Engineers requiring the owner to remove a 20-foot section of the wharf. The court held that the wharf owner's state-granted constructive easement over the submerged land was always subject to the federal government's control regarding navigation pursuant to the Commerce Clause. The U.S. Army Corps of Engineer's order to remove, acting pursuant to the Commerce Clause, was permissible and was not a taking, despite the state granted easement in the state-owned submerged lands. *Id.*

99. ME. REV. STAT. ANN. tit. 12, § 558-A(6) (West 1994 & Supp. 1996). That constructive easement terminates October 1, 2005 or sooner if the owner ceases or substantially changes the use. The enactment of the Submerged Lands Act was followed by an opinion of the Attorney General's office that the term "structure" in the Act included fill on formerly submerged or intertidal lands which were filled prior to October 1, 1975. The ensuing debate about whether "owners" held the land in fee or only pursuant to an easement which would expire in thirty years was eventually resolved by the passage of a provision relinquishing all state claims to these formerly filled submerged lands. *Id.* § 559. An opinion of the Supreme Judicial Court concluded that the title-clearing legislation giving up any state interest in these formerly filled tidelands did not violate the public trust. Opinion of the Justices, 437 A.2d 597 (Me. 1981). See also Tannenbaum, *supra* note 81, at 138-40.

100. Clarke Canfield, *Survey to Count All Structures on the State's Waters*, ME. SUNDAY TELEGRAM, Dec. 2, 1990, at B14.

submerged lands leasing program has provided important oversight for uses commencing after 1975, to date it has had no impact on the vast majority of permanent, private uses of submerged lands.

If not sooner amended, in 2005, the submerged lands leasing program could become a much more important tool for implementing state management policies. Two of the stated purposes of the submerged lands program are to balance competing uses and to regulate private use, considering the impacts of private use on the public's ability to use and enjoy trust rights, and the public's right to fair compensation for allowing private use.¹⁰¹ The public trust uses which may take place without a lease or easement include transitory fishing, fowling, recreation, navigation, and other customary or traditional uses whereby the public may use or enjoy the waters, submerged lands, and associated natural resources of the State.¹⁰² Addressing the potential for conflict, the 1986 policy manual for submerged lands management asserts "[c]oordinated management is necessary to resolve the increasing number of conflicts that may arise between development and preservation of environmental quality, resource conservation and public rights to use these resources."¹⁰³ It notes that numerous state and federal laws, specifically including resource protection laws, also apply to submerged lands, and that other state agencies and municipalities share management responsibilities with BPL. Using as its guide the need to "provide the greatest long-term benefits for all the people in Maine," the 1986 policies stated:

To this end, leases and easements have been prioritized in terms of their impact on public rights, customs and uses. Leases and easements determined to be most desirable are those issued for uses which depend on the water and/or submerged lands for their existence and which make wise use of the natural renewable resources therein. Leases and easements deemed to be least desirable are those issued for uses which are not dependent on the water and/or submerged lands and which cause irreversible changes therein. Since private use of submerged land unavoidably restricts general public use of this resource, fees shall be imposed on those private users.¹⁰⁴

101. BUREAU OF PUB. LANDS, *supra* note 88, at pmbl. & § 1.2.

102. *Id.* § 1.4(P).

103. BUREAU OF PUB. LANDS, SUBMERGED LANDS PROGRAM RULES AND POLICIES MANUAL § 3.2 (1986).

104. *Id.*

The details of the lease requirements have changed over time,¹⁰⁵ but the basic priorities have been consistent. Highest rents are charged for upland uses and fill.¹⁰⁶ Recreational boat slip space is generally next highest, followed by commercial fishing boat slip space and water dependent commerce, industry, and private uses.¹⁰⁷ The lowest assessed fee is for commercial fishing facilities.¹⁰⁸ No lease fee is charged for publicly owned facilities offering public access at free or nominal rates, structures utilized by municipal sewer and water districts, or port facilities providing a significant public benefit which are an essential component of the marine waterway infrastructure.¹⁰⁹

The incentives incorporated in the lease rates are supplemented by standards to address public trust concerns. For example, in addition to being required to pay higher lease fees, applicants for upland uses must also prove that they are an essential part of a commercial fishing or water-dependent use and there is no other reasonable alternative site available.¹¹⁰

These standards generally protect public trust uses, but provide little practical guidance on use conflicts. For example, one standard states that the director may deny a lease if it would "unreasonably interfere with customary or traditional public access ways to, or public trust rights in, on or over the intertidal or submerged lands and the waters above those lands."¹¹¹ Other standards give more guidance on use priorities. For example, the lease standards incorporate a preference for commercial

105. It has evolved from flat fees per square foot varying with use, to a system of fees based on a percent of assessed value of the adjacent upland, with the percent varying with use. A different system is used for marinas. BUREAU OF PUB. LANDS, *supra* note 88, § 1.8

106. *Id.*

107. *Id.*

108. *Id.*

109. This describes the 1990 rate structure, based on a varying percent of the assessed per square foot value of the adjacent upland. ME. REV. STAT. ANN. § tit. 12, § 558-A (West 1994 & Supp. 1997). The 1985 rates used the same priorities, but established a flat rate across the state; the basic fee was \$.04 per square foot for upland uses, \$.02 for water dependent or water associated uses, and \$.01 for commercial use of renewable aquatic resources. BUREAU OF PUB. LANDS, *supra* note 103, § 3.8. In response to protests by marina operators, 1991 amendments further changed the rental fee for slip space by basing it on gross income rather than assessed value of the adjacent upland. ME. REV. STAT. ANN. tit. 12, § 558-A (1994). The lease fees are also adjusted by annual increases.

110. For example, under the 1992 rules, upland uses and fill will not be permitted on submerged land unless "they are for an essential but subsidiary part of a commercial fishing use, water dependent use, shoreland stabilization, cable, or pipeline" and there is no other reasonable alternative site available. BUREAU OF PUB. LANDS, *supra* note 88, § 1.6(B)(18).

111. ME. REV. STAT. ANN. tit. 12, § 558-A (2).

fishing activities. To grant a lease, the director must find that it will not unreasonably interfere with navigation, fishing or other existing marine uses of the area, ingress and egress of riparian owners, nor will it "unreasonably diminish the availability of services and facilities necessary for commercial marine activities."¹¹² The rules provide additional guidance on how to evaluate impacts upon commercial fishing industries or infrastructure.¹¹³ The priority for commercial fishing and other commercial marine activities applies not just to direct conflicts such as proposed recreational berthing which would displace existing fish boat berthing, but also to less direct conflicts which would nonetheless reduce economic viability of commercial fishing.¹¹⁴

112. *Id.* § 558-A (2)(A)(6).

113. The rules state:

For consideration of impacts upon commercial fishing industries or infrastructure, the following guidelines shall apply:

- a. The use will not result in the loss or unreasonable diminishment of opportunity to economically pursue commercial fishing for the operators of any commercial fishing vessels that will be displaced;
- b. The use will not result in a loss of access or unreasonable diminishment of access to existing commercial fishing grounds.
- c. The use will not result in a loss or unreasonable reduction of repair and maintenance services essential for commercial fishing operations.
- d. The use will not result in a loss of fish buying, processing, or handling facilities that are in operation at the time of the application.
- e. The use will not result in a loss or unreasonable diminishment of access to existing commercial fishing facilities.

BUREAU OF PUB. LANDS, *supra* note 88, § 1.7(C)(4).

114. *See, e.g.*, the proposal of Mount Desert Realty Trust for a recreational marina and "boatel" (lodging for marine travelers) in Bass Harbor on Mount Desert, Maine which was denied by BPL, in part, because it might have caused the number of commercial fishing vessels in the vicinity to support critical repair services for that type of vessel. BPL found:

1. There is evidence that the marina will unreasonably interfere with the ability of commercial fishermen to continue to economically pursue their livelihood in Bass Harbor.
2. There is evidence that the marina will unreasonably diminish the availability of services and facilities necessary for commercial marine activities.
3. Bass Harbor is important to the Mount Desert Island region as a commercial fishing harbor. Any impacts to the industry in Bass Harbor must be considered cumulatively with the impacts that have already occurred within the region.

In re Mount Desert Realty Trust, Findings & Decision, BPL, Mar. 11, 1991. The complaint challenging the decision as arbitrary and capricious was dismissed by stipulation. Mount Desert Realty Trust v. Bureau of Pub. Lands, No. CV-91-455 (Me. Super. Ct., Ken. Cty., Nov. 21, 1991) (stipulation of dismissal).

Additional standards to minimize conflicts require the director to consider traffic congestion,¹¹⁵ marine habitats or similar protected areas,¹¹⁶ and consistency with certain Coastal Policies.¹¹⁷ Similarly, the lease will not be granted if it fails to comply with requirements of other state, federal or municipal agencies with jurisdiction over the area of the proposed project.¹¹⁸

In summary, the submerged lands leasing program incorporates general public trust principles, but also goes beyond those principals to establish a hierarchy of uses. New uses are not favored if they will unreasonably interfere with commercial fishing or existing marine uses. Non-water dependent uses are not favored. Commercial fishing industries and infrastructure¹¹⁹ receive special consideration in lease decisions.

Despite its carefully crafted priorities, to date the submerged lands leasing program has only a very limited impact on use of the state's coastal waters. The program itself has limited public support.¹²⁰ It affects only new uses or a significant change in existing uses, so has not yet been applied to the vast majority of uses in existence in 1975. It applies only to non-exempt uses that occupy submerged lands on a "permanent," exclusive basis; some permanent uses are exempt from BPL jurisdiction¹²¹ and

115. "The use will not result in a significantly increased risk to life or property in the vicinity of the use under conditions of weather and vessel traffic that are likely to be encountered." BUREAU OF PUB. LANDS, *supra* note 88, § 1.7(C)(5).

116. "The use will not conflict with established management guidelines designed to protect marine habitats or other areas of submerged lands which have been designated for special protection status by an agency authorized to make such designations." *Id.* § 1.7(C)(7).

117. *Id.* § 1.7(C)(8). "The use does not conflict with those aspects of the Coastal Policies or the Coastal Policy guidelines . . . which relate to the criteria considered by the Bureau as outlined in these rules."

118. *Id.* § 1.7(C)(6).

119. Defined to include landing, processing, loading, or selling of shellfish, finfish or natural renewable products of the sea or aquaculture products, fish piers, lobster impoundments, fish processing facilities, fuel and ice facilities, berthing for fishing boats, and floats or piers for the storage of gear. *Id.* § 1.4(C).

120. Marina operators and others continue to challenge the concept that they should have to pay rent to the state for the right to have a permanent use on publicly owned lands. In 1995 a compromise was reached and the Act was amended to place a cap of \$1,200 per year on rent. An Act to Amend the Law Regarding the Lease of Submerged Lands, c. 666, sec. 6, 1995 (codified as amended at 12 M.R.S.A. § 558-A(2)(E) (West Supp. 1997)).

121. For example, submerged lands leases for marine research and aquaculture facilities are governed by the Department of Marine Resources, not BPL. Similarly, water-dependent uses less than 500 square feet, commercial fishing uses which occupy less than 2,000 square feet, certain state bridges, harbor improvement by the federal government,

exercise of non-exclusive public trust rights are not governed by the program.¹²² The submerged lands leasing program, important as it is, is not a substitute for a comprehensive plan for the use of marine waters.

3. *Aquaculture Leasing Program*

Leases of submerged lands for scientific research and aquaculture are issued by the Department of Marine Resources (DMR) rather than the Bureau of Public Lands.¹²³ DMR leases are required for finfish culture in nets, pens, or other enclosures and for suspended culture of any other marine organism.¹²⁴

Various mechanisms to balance uses of the area are built into the application process. DMR considers: physical and ecological impacts of the proposed projects on existing uses, potential uses, and on commercially and ecologically significant flora and fauna; the degree of exclusivity required by the proposed use; possible conflicts with traditional fisheries; and possible impact on municipally-designated or traditional storm anchorages in proximity to the proposed lease.¹²⁵ The lease may be granted if it will not unreasonably interfere with: ingress and egress of riparian owners; navigation; "fishing or other uses of the area taking into consideration the number and density of aquaculture leases in an area,"¹²⁶ existing ecologically significant flora and fauna; and public use or enjoyment within 1,000 feet of publicly-owned parks or docking facilities.¹²⁷

In addition, the statute indicates preferences to be applied in the relatively unlikely event that more than one person applies to lease the same area for aquaculture or scientific research. First preference goes to DMR, followed by the riparian owner of the intertidal zone within the leased area,¹²⁸ then "fishermen who have traditionally fished in or near the proposed lease area," and next the riparian owner within 100 feet of leased

single moorings for vessels less than 65 feet in length, and single family residential water intake pipes are exempt from the lease requirements. BUREAU OF PUB. LANDS, *supra* note 88, § 1.5.

122. *Id.*

123. ME. REV. STAT. ANN. tit. 12, § 6071 (West 1994 & Supp. 1997).

124. *Id.* § 6072 (1-A). The lease can be for up to 10 years, for tracts of not more than 5 acres; contiguous lease tracts can be granted to a single applicant, up to limits of 100 acres for a single lease, and an aggregate of up to 200 acres per person. *Id.* § 6072(2), (2)(E).

125. *Id.* §§ 6072(5-A), 6072(4) (D-1), (D-2).

126. *Id.* § 6072(7-A).

127. *Id.* § 6072(7-A).

128. Assuming the lease tract includes intertidal land.

coastal waters.¹²⁹ If the contest is between an applicant for a submerged lands lease and an aquaculture lease, the Commissioners of the two departments are to determine which project "is in the best interest of the State."¹³⁰

The statute does not include criteria to address impact on views or property values of upland owners nor does it give special consideration to objections or claims of riparian owners unless the lease tract is on or within 100 feet of privately-owned intertidal land. Upland uses are not included within the "other uses of the area" which are to be protected from unreasonable interference.¹³¹

These criteria call for DMR to engage in a fairly comprehensive review to minimize space and resource conflicts from new aquaculture enterprises. DMR considers not only physical conflicts, but also whether multiple activities could still be accommodated on the same space. It also looks at environmental impacts of the use on the site and in the surrounding area. These criteria have been shaped by competing considerations; they seek to protect traditional uses from disruption by newly emerging aquaculture while at the same time allowing the state to enjoy the economic benefits of this new industry. The question of what constitutes "unreasonable interference" requires a careful balancing for each application, particularly as new forms of aquaculture emerge.

4. *Coastal Management Policies Act*

The submerged lands and aquaculture leasing programs both concern physical space allocation systems. In 1986, Maine enacted the Coastal Management Policies Act, a law which took a broader approach to establishing coastal priorities.¹³² The law established nine policies designed to respond to unprecedented shoreline development and to guide coastal resource use. The Act's preamble stressed the importance of "striking a carefully considered and well reasoned balance among the

129. ME. REV. STAT. ANN. tit 12, § 6072(8).

130. *Id.* § 6072(14).

131. *Harding v. Commissioner of Marine Resources*, 510 A.2d 533, 536 (Me. 1986). The court held property value diminution of upland property was not relevant to the statutory criteria for issuance of a lease, and "other uses of the area" more likely was meant to protect lobstering, clamming, scalloping, swimming, mooring of boats, and other activities that traditionally take place in the areas where aquaculture is to transpire. *Id.*

132. ME. REV. STAT. ANN. tit. 38, §§ 1801-1803 (West 1989).

competing uses of the State's coastal area,"¹³³ defined to include the area from the inland boundary of coastal towns to three miles offshore.

By Executive Order,¹³⁴ state agencies were required, and federal and local agencies encouraged, to review their policies and, by December 31, 1987, implement necessary changes to make them consistent with the nine policies contained in the Act.¹³⁵ The Act was supplemented by a modest document suggesting implementation procedures.¹³⁶ No mechanisms were established for striking a balance among potentially inconsistent goals, nor were penalties established in the Act for non-compliance.

The policy most applicable to coastal waters, the marine resource management policy, states in full that relevant agencies must:

Manage the marine environment and its related resources to preserve and improve the ecological integrity and diversity of marine communities and habitats, to expand our understanding of the productivity of the Gulf of Maine and coastal waters and to enhance the economic value of the State's renewable marine resources.

The Act provides a valuable starting place by articulating a policy which grants highest priority to uses which protect ecological integrity and marine habitats. Similarly, it stresses the value of renewable marine resources. Beyond these general expressions, the Act and its policies fail to provide much guidance for specific use decisions.¹³⁷

133. *Id.* § 1801.

134. Me. Exec. Order No. 3 FY 86/87 (Sept. 16, 1986).

135. The Act was further implemented when these policies were incorporated by reference into the Growth Management Act in 1987 (ME. REV. STAT. ANN. tit. 38, § 4301-4349 (West 1996)) and the Shoreland Zoning Act in 1989 (ME. REV. STAT. ANN. tit. 38, § 435-449 (West 1989 & Supp. 1997)). Maine's Growth Management Act encourages municipalities to undertake comprehensive planning. In addition to incorporating the Coastal Management Policies Act policies, it set out ten additional policies with which local plans are to be consistent. The main policy addressing marine issues articulates the goal "to protect the State's marine resources industry, ports and harbors, from incompatible development and to promote access to the shore for commercial fishermen and the public." (ME. REV. STAT. ANN. tit. 30-A, § 4312(3)(G) (West 1996)).

136. COASTAL ADVISORY COMM., COASTAL MANAGEMENT POLICY GUIDELINES (1986). This was later supplemented by a 1988 document prepared for use by local officials to assist them in incorporating the coastal management policies into newly mandated local comprehensive plans. ME. DEP'T OF ECON. AND COMMUNITY DEV., COASTAL MANAGEMENT TECHNIQUES: A HANDBOOK FOR LOCAL OFFICIALS (1988).

137. The Coastal Advisory Committee issued Coastal Management Policy Guidelines which paralleled the nine policies as a "framework and context for all public and private

Other relevant, equally brief policies note the importance of using ports and harbors for fishing, transportation and recreation; giving preference to water-dependent uses; protecting and managing critical habitat and natural areas; expanding opportunities for outdoor recreation; encouraging appropriate coastal tourist activities and development; and maintaining water quality to "allow for the broadest possible diversity of public and private uses."¹³⁸ The Act itself is more of a list of concerns, with no direction on prioritization of uses. The accompanying advisory guidelines for policy implementation indicate a clear preference for commercial over recreational uses, but that preference is not contained in the underlying legislative enactment.¹³⁹

Because of the brevity of the policies, lack of implementing mechanisms, and a change in administrations and department staff, this Act failed to live up to its promise to be the framework for governmental resource management decisions in the coastal area of Maine. Specifically, the Act emphasizes shoreline development rather than coastal waters, and fails to address competing water use in any significant way. State and local agencies have continued to address issues which are also addressed in the Act, but the Act itself was not the impetus for those activities. For example, a 1989 assessment concluded that implementation of the coastal policies "has not occurred in a systematic manner, however, because few state agencies and municipalities amended their decision-making processes to specifically incorporate the policies."¹⁴⁰ The Act is cross-referenced in several other statutes and occasional state reports, but it is rarely utilized to establish the theoretical context for specific marine policy decisions.

decisions affecting the future of the Maine coast." They were also extremely brief, but identified implementation procedures for each policy. The marine resource management policy implementation procedures included: state marine research priorities; species-specific research and monitoring; research to minimize adverse impacts of fishing gear; comprehensive river and sports fisheries management plans; seafood marketing programs; encourage aquaculture "where it is compatible with established fisheries;" prohibition on new or expanded waste discharges to potentially productive shellfish producing areas; and tidal flat management initiatives. COASTAL ADVISORY COMM., *supra* note 136, at 5. The guidelines were to assist individual agencies in meeting their obligations under the Act.

138. ME. REV. STAT. ANN. tit.38, § 1801 (West 1989).

139. For example, the Guidelines indicate priority consideration is to be given to significant commercial ports over others in funding port infrastructure and preference is to be given to commercial over recreational water-dependent uses. COASTAL ADVISORY COMM., *supra* note 136, at 4.

140. STATE PLANNING OFFICE, ME. COASTAL PROGRAM, IMPLEMENTATION OF MAINE'S COASTAL POLICIES 1986-1988 at 18 (submitted to Maine State Legislature, Jan. 1, 1989).

5. *Summary*

The public trust doctrine assists with the definition of broad categories of permissible and impermissible uses of submerged lands such as fishing, fowling, navigation, recreation, and environmental protection, but is of only marginal assistance in establishing priorities within the universe of permissible uses. Maine has made a good start, through the Submerged Lands Leasing program, to further distinguish between water-dependent and upland uses, commercial and recreational uses, and to develop explicit guidelines for balancing uses that might conflict with commercial fishing.¹⁴¹ Similarly, the aquaculture leasing standards articulate guidelines for assessing use conflicts. But both of these programs apply only to certain permanent uses, which constitute a small subclass of coastal water uses, and usually, with the exception of commercial fishing, consider only physical space conflicts. Most other efforts to control coastal development have focused on the shoreside aspects. To the extent the coastal policies mention the marine environment, the policies are vague and fail to address tradeoffs among potentially conflicting uses.

C. State/Local Division of Authority Over Maine's Coastal Waters

Nearshore and harbor areas are the portion of coastal waters likely to experience the greatest number of use conflicts. The quantity of users near human settlements, the heightened vulnerability of marine ecosystems due to impacts from land-based uses, the scarcity of shoreline appropriate for land/water transfer facilities, the variety of uses conducted close to the shoreline, and the greater natural productivity of shallow waters all contribute to the likelihood of use conflicts. Yet, it is in this area that there are the most questions about regulatory authority, due to the overlap of state and municipal jurisdiction.

Just as regulatory complexities arise from concurrent state and federal jurisdiction over coastal waters,¹⁴² they also arise from overlapping state and local authority over coastal waters. States can expressly delegate authority to municipalities, can allow municipalities to exercise their home rule authority, or can opt to preempt local regulation. However, unlike the state-federal relationship which is based on powers originally reserved by the federal government and statutes enacted pursuant to those powers, the

141. *See supra* Part III.B.2.

142. *See supra* Part II.B.

state-local division of authority is somewhat more fluid; the state can opt to alter the allocation of authority between it and its subdivisions at any time through legislative action.¹⁴³

In Maine, municipal jurisdiction over coastal waters derives from the fact that Maine's coastal towns usually encompass some state-owned submerged lands within their boundaries.¹⁴⁴ Thus, through a combination of express statutes and home rule powers,¹⁴⁵ coastal towns have some regulatory authority over matters occurring in, on or over submerged lands

143. For example, 1987 amendments to the Harbor Masters Act curtailed municipal discretion in the assignment of mooring privileges. Prior to that, most towns had given priority to municipal residents over nonresidents. Reasoning that a state resource, submerged lands, should be available to all state residents on an equal opportunity basis, the amendment establishes a system to assign 10% of moorings to nonresidents in commercial and noncommercial categories. ME. REV. STAT. ANN. tit. 38, § 7-A (West 1989).

144. The division of the state into various political subdivisions (counties, districts, towns, plantations and unorganized territory) did not affect ownership of submerged lands; ownership was retained by the state. ME. REV. STAT. ANN. tit. 1, §§ 2,3,7 (West 1989). But each coastal town may have some state-owned submerged lands included within the town's boundaries, and thus exercise jurisdiction over certain activities taking place on or over those lands. ME. REV. STAT. ANN. tit. 12, § 573 (West 1994). Some towns have jurisdiction over extensive water areas. The extent of submerged lands within a town's boundaries can only be determined by reviewing the original act of town incorporation. For example, Portland's boundaries include Cushing, Great Diamond, Little Diamond, and Peaks Islands, and the waters of Casco Bay from the mainland to beyond these islands. *See, e.g.*; An Act for Erecting that Part of the Town of Falmouth, in the County of Cumberland, into a Town by the name of Portland, Private and Special Statutes, Massachusetts, July 4, 1786. Similarly, the Town of Long Island, formerly part of Portland, includes additional islands and extensive coastal waters, spanning from a line through Hussey Sound to the mean high water line along the Hope Island shoreline. An Act to Allow the Separation of Certain Islands in Casco Bay from the City of Portland, Ch. 100, Private and Special Laws, Second Regular Session 1991.

145. Pursuant to its general "home rule" authority, a Maine municipality can exercise those regulatory powers that the state could expressly delegate to it, so long as the state has not already expressly denied that power or acted to regulate that activity with the intent that its regulations be the only regulations. ME. REV. STAT. ANN. tit. 30-A, §§ 2003 & 3001 (West 1996 & Supp. 1996). Thus, even in the absence of a specific enabling act, because the state could theoretically delegate powers to regulate water uses to towns, municipalities possess a broad prerogative to regulate matters occurring within their water-side boundaries. The limitations on this are that: 1) the regulations can only apply to activities within the geographic boundaries of the town; and 2) the regulations may not conflict with state or federal statutes or regulations.

within their boundaries.¹⁴⁶ In theory, these municipal powers can be employed to resolve near-shore marine use conflicts.

However, questions remain about the extent of municipal authority over state-owned lands. Depending upon the degree of state involvement in the project and the nature of the ordinance the municipality seeks to enforce, the use may be exempt from municipal regulation.¹⁴⁷

In actual practice, municipal regulation of coastal waters has generally been restricted to relatively simple harbor management plans which allocate mooring privileges and impose simple rules for vessel safety.¹⁴⁸ However, as use conflicts escalate, new questions are being raised about the geographic and subject matter boundaries of municipal authority, and the relative jurisdiction of the state over submerged lands.

The primary statute granting municipalities authority over coastal waters is the Harbor Masters Act.¹⁴⁹ It gives a town authority to regulate its harbor by appointing a harbor master to assume statutorily-defined

146. Maine does not have a law that expressly authorizes either the state or the municipalities to regulate water areas in a comprehensive manner comparable to those laws authorizing land-based zoning. However, the power to regulate water areas in this manner is inherent in state sovereignty. HARRIET P. HENRY, STATE PLANNING OFFICE, COASTAL ZONE MANAGEMENT IN MAINE: A LEGAL PERSPECTIVE 71 (1973). In addition, by statute, municipal land use ordinances control allowable uses of "land." 30 M.R.S.A. § 4301(8) (West Supp. 1994). Municipalities may exercise their land use planning and management authority over the "total land area within their jurisdiction." 30 M.R.S.A. § 4325 (West Supp. 1994). If "land" is interpreted broadly to include submerged lands as well as uplands, municipalities do have express statutory authority to manage the use of water surfaces and submerged lands within municipal boundaries.

147. Until 1993, any municipal zoning ordinance was "only advisory" with respect to the state. ME. REV. STAT. ANN. tit. 30-A, § 4352(6) (West 1996). *See, e.g.*, *Senders v. Town of Columbia Falls*, 647 A. 2d 93, 95 (Me. 1994). However, in 1993 the law was amended to require that, for certain types of development, the state comply with local zoning ordinances which are consistent with the Growth Management Act. 30-A M.R.S.A. § 4351(6) (West Supp. 1994). It is not yet clear how this will apply to private development on leased state-owned lands.

148. Local coastal management typically addresses land-based issues. For example, a review of 27 comprehensive plans prepared by coastal towns found their discussion of coastal issues focused primarily on upland or intertidal use, and harbor issues. While "marine resources" was the issue identified by the most towns, the emphasis was on intertidal areas, such as reopening of shellfish beds. The next most frequently identified issues were upland public access to the shoreline (desire to increase or problems created by diminished access), port and harbor management (filled to capacity, mooring realignments, or protection of utility for commercial users) and preservation of shorefront property for water dependent uses. CATENA ET AL., *supra* note 31, at 44-45.

149. Harbor Masters Act, ME. REV. STAT. ANN. tit. 38, § 1 (West 1989 & Supp. 1996).

harbor management powers. The harbor master's actions must be consistent with the statute and with any locally enacted supplements such as a municipal harbor management plan. The enabling statute expressly authorizes the harbor master to control moorings, including waiting lists, assignment, placement, fees, construction standards and appeals; designate channel boundaries and anchorage areas; and enforce rules for safe operation of vessels. But the Act does not limit municipal regulatory authority to these subjects; it acknowledges that a town may adopt ordinances to regulate other aspects of the harbor as well.¹⁵⁰

Until about a decade ago, Maine's harbor masters operated with a high degree of autonomy; oversight of the harbor master was frequently limited to the reappointment decision. A 1986 Superior Court case held that harbor masters alone had the power to assign moorings, to the exclusion of the town.¹⁵¹ In response, Maine's legislature clarified that towns could enact regulations to supplement statutory provisions, and that those regulations would be binding on the harbor master.¹⁵² Building on this clarification, starting in approximately 1987, Maine's Coastal Program and other interested groups and citizens began to encourage municipalities to form harbor committees and to engage in more comprehensive harbor management planning.¹⁵³

By virtue of the express provisions of the Harbor Masters Act, it is beyond question that municipalities have authority to regulate individual moorings, channels, anchorage areas, and vessel operations in the harbor. However, as the express enabling legislation is silent on non-vessel uses of

150. The Harbor Masters Act states it is not a "limitation on the authority of municipalities to enact ordinances to regulate . . . other activities in their harbors." *Id.* § 7. Additional state statutes anticipate municipal harbor management or water use regulation as well. For example, Maine recently created a Shore & Harbor Management Fund, administered through the Bureau of Public Lands, to provide grants to municipalities to develop harbor management plans and public access facilities. ME. REV. STAT. ANN. tit. 12, § 558-B (West 1994). The Shoreland Zoning Act was amended in 1994 to allow municipalities to regulate "structures" located below the normal high water line of a water body or within a wetland, which was defined to include all tidal and subtidal lands. ME. REV. STAT. ANN. tit. 38, §§ 436-A(1) & 439-A(2) (West 1989 & Supp. 1996). Similarly, municipal harbor management activities have been encouraged as part of the Growth Management Act. (ME. REV. STAT. ANN. tit. 30-A, § 4312(G) (West 1989 & Supp. 1996).

151. *South Freeport Marine, Inc. v. Freeport*, No. CV-85-1001 (Me. Sup. Ct., Feb. 27, 1986).

152. ME. REV. STAT. ANN. tit. 38, § 7 (West 1989).

153. See GOVERNMENTAL SERVICES INC., COMPREHENSIVE HARBOR PLAN FOR THE TOWN OF SCARBOROUGH (1987); WILLIAM PROSSER *ET AL.*, HARBOR MANAGEMENT: A LEGAL GUIDE FOR HARBOR MASTERS AND COASTAL OFFICIALS (1993).

the harbor, the authority to regulate such non-vessel uses is dependent upon an interpretation of home rule authority.¹⁵⁴ Similarly, questions remain about the geographic limits of the harbor master's authority, including whether that authority extends to all coastal waters, both harbor and non-harbor, within the town's jurisdiction.¹⁵⁵

The answer to both of these questions requires an analysis of state preemption and an assessment of the State's willingness to allow municipalities to exercise these powers. The state, as owner of submerged lands, retains ultimate planning and management responsibility for these public trust lands and could opt to assert its authority to impose a regulatory scheme which would override or preclude municipal regulations.

A 1987 Bureau of Public Lands study of harbor master authority recognized the tension between state trust responsibilities and municipal on-site management.¹⁵⁶ While advocating a continuation of the traditional system, that the authority to "manage harbors and assign mooring privileges should continue to reside at the local government level,"¹⁵⁷ BPL appeared to be using "harbor management" in a very narrow sense, limited to vessel safety and mooring issues. That recommendation was immediately followed by a qualification:

The Bureau of Public Lands will continue to have management responsibility for all other permanent uses of submerged land.

154. A court might ultimately find that a town may adopt regulations to control non-vessel uses of the harbor based on its home rule authority or implied authority. The absence of definitions of key terms such as "harbor management plan" and "activities in the harbor" leaves some ambiguity. A partial answer might be provided by the 1994 amendment to the Shoreland Zoning Act which gave municipalities the power to use shoreland zoning ordinances to regulate structures in the water. ME. REV. STAT. ANN. tit. 38, § 439-A(2) (West 1989 & Supp. 1996). By general definition, "structures" include anything built for the enclosure of animals or property, and anything constructed with a fixed location on or in the ground. *Id.* § 436-A(12). It is too early to assess the impact of this change, but it is arguable that this amendment gives towns the express authority to use zoning to regulate moorings, aquaculture facilities, moored floating storage sheds, floating restaurants, and similar structures on or over submerged lands. But there may be other limitations on the authority of municipal zoning to control state-owned and state-leased submerged lands. See *supra* note 147.

155. The geographic boundaries of a "harbor" are not defined. A 1987 study recommended that the legislature eliminate any confusion by extending the harbor masters' authority to all waters within the jurisdiction of the town. BUREAU OF PUB. LANDS, DEP'T OF CONSERVATION, HARBOR MASTER AUTHORITY STUDY 20 (1987). No action was taken on that recommendation.

156. *Id.* at 9-10.

157. *Id.* at 22.

Future demands on this resource as a whole may necessitate a major effort to inventory the resource and allocate certain areas for specific uses. If and when this becomes necessary, the Bureau will work with municipalities and others involved to determine the appropriate areas to be reserved for mooring and anchorage.¹⁵⁸

As long as these questions remain, management of harbor and nearshore areas will probably be less than comprehensive due to concerns about which governmental entity has jurisdiction.

D. Are Maine's Mechanisms and Institutions Capable of Resolving Marine Use Conflicts?

A recent study on states' ocean management capacity identified four factors which indicate whether it is likely that a state will be able to initiate and sustain ocean management efforts.¹⁵⁹ The focus was on more ambitious management efforts which would encompass not only the three-mile territorial sea but also areas out to the 200-mile exclusive economic zone.¹⁶⁰ Four major variables were found to be most predictive of a successful ocean management effort: (1) state ocean heritage and popular opinion about the oceans; (2) governmental readiness for ocean affairs; (3) the degree of severity of ocean and coastal governance problems and the role of focusing or triggering events; and (4) the degree of political readiness.¹⁶¹ A state which meets some, but not all, of the criteria may still have the capacity to undertake the more limited first step, management of the state's coastal waters rather than full-scale, 200-mile ocean management system.

Without question, Maine meets the first criterion of a state ocean heritage. Maritime resources are highly valued as part of the state's cultural identity and as a major component of the state's economy.

Governmental readiness for ocean affairs, the second criterion, is a more limiting factor. There is no central entity for marine affairs in the

158. *Id.*

159. BILIANA CICIN-SAIN ET AL., *supra* note 31, at 21.

160. "Ocean management" is defined to encompass both the three-mile territorial sea and 200-mile exclusive economic zone. *Id.* at 11. The goals are to improve state capacity for ocean management and to enhance the role of the states in decision-making about ocean resources in federal waters. *Id.* at iii. It also implies policy integration to go beyond the management of a single marine resource and implies stewardship of marine resources for sustainable use. *Id.* at iv.

161. *Id.* at 21.

state; responsibility for activities in the marine environment is divided among approximately twenty-eight agencies in ten different departments.¹⁶² Governors have attempted to use the Marine Policy Committee, a standing subcommittee of the interagency Land and Water Resources Council to advance interagency coordination, but the results have been uneven.¹⁶³ Legal tools for waterside management are relatively undeveloped, and constrained by unresolved issues.¹⁶⁴ Similarly, the budget problems faced by the state over the last several years have not been conducive to new state-funded initiatives to address specific ocean sectors nor to study cross-cutting marine policy issues. On the more positive side, however, the state has committed significant resources to land-based coastal management over the last decade through its federally-funded coastal management program and its local comprehensive planning initiative.¹⁶⁵ More recently it has made progress on regional watershed and ecosystem-based management of its estuaries.¹⁶⁶ The ongoing Gulf of Maine initiative¹⁶⁷ and Casco Bay Estuary Project¹⁶⁸ evidence a willingness to explore management of coastal and ocean waters. Similarly, an excellent baseline study on marine waters governance issues has been completed.¹⁶⁹ These efforts have moved the state into a good position to expand its concerns to state-wide waterside aspects of the coastal zone.

162. CATENA ET AL., *supra* note 31, at 47.

163. The standing subcommittee was constituted for this purpose in 1991 and produced an important report on marine policy in 1992. *Id.* at 52. The subcommittee has since been disbanded as a standing committee, but the Council, as a whole, addresses aspects of issues affecting the marine environment on an occasional basis. The Marine Policy Committee continues to meet twice a year to serve an interagency coordinating function.

164. *See supra* Part III.B.5.

165. *See* ME. COASTAL PROGRAM, ME. STATE PLANNING OFFICE, THE COASTAL ZONE MANAGEMENT ACT: A RESOURCE BOOK FROM MAINE (1995).

166. *See* JOSIE QUINTRELL & GRO FLATEBO, MAINE COASTAL PROGRAM, OPTIONS FOR MANAGING MAINE'S NEAR SHORE ECOSYSTEMS (1995).

167. This effort by the states of Maine, New Hampshire and Massachusetts and provinces of Nova Scotia and New Brunswick, was initiated in 1989 to cooperatively protect the resources of the Gulf of Maine through voluntary implementation of a Gulf of Maine Action Plan. *See* THE GULF OF MAINE: SUSTAINING OUR COMMON HERITAGE (comp. By Maine State Planning Office, 1989); COUNCIL ON THE MARINE ENV'T, THE GULF OF MAINE ACTION PLAN (1991).

168. The Environmental Protection Agency designated Casco Bay as an estuary of national significance in 1990. The Casco Bay Estuary Project is now implementing its comprehensive conservation and management plan. CASCO BAY ESTUARY PROJECT, CASCO BAY PLAN (1996).

169. CATENA ET AL., *supra* note 31.

The third criterion, the degree of severity of ocean and coastal governance problems, indicates that these concerns are likely to command more attention if there is a high degree of conflict or if there is an external threat that catalyzes the state government and the public. The controversy could theoretically be precipitated by conflicting demands of uses such as marine transportation, commercial and recreational fisheries, mariculture, tourism and other recreational uses, ocean waste disposal, military activity, marine protected areas, and could be increased by conflicts between parallel state agencies with different sectoral responsibilities.¹⁷⁰ However, the states historically most active in ocean management efforts tend to have been reacting to offshore oil and gas or marine mineral exploration and development proposals.¹⁷¹ States that have not faced major proposed actions in adjacent federal waters have tended to be fairly inactive on the issues of ocean management.¹⁷²

To date, while Maine is experiencing generalized use conflicts and is fully engaged in major issues surrounding the possible collapse of the groundfish industry, it has been spared from the threat of large-scale development actions in federal waters. It has not experienced immediate incentives to engage in ocean management as a means of exerting more state influence or control over proposed federal actions. Governmental and public awareness of use conflicts and increased appreciation of the importance of marine resources might translate to support for efforts to manage the state's coastal waters, but there is probably insufficient interest at this time to pursue full ocean management. That could quickly change if the state is confronted by tentative plans for development immediately outside state waters, or if the state experiences a major oil spill¹⁷³ or similar externally-imposed catalyzing event.

The final criterion, political readiness, is a measure of the presence of "ocean policy entrepreneurs" in the legislature, executive departments or in the public; the extent of legislative and executive agreement on ocean issues; the extent of cooperation among ocean interests to pursue

170. CICIN-SAIN ET AL., *supra* note 31, at iv.

171. *Id.* at 16.

172. *Id.* at 21.

173. Maine experienced a significant oil spill on September 27, 1996 when the 560-foot tanker *Julie N* spilled 170,000 gallons of fuel oil into Portland Harbor and the Fore River Estuary after striking a bridge support. Dieter Bradbury, *Board Lifts Oil-Spill Pilot's License*, PORTLAND PRESS HERALD, Oct. 10, 1996, at 1 (*available in* 1996 WL 13305189). Smaller spills also occur with some regularity. General public sentiment, however, has yet to be galvanized into planning for full ocean management.

cross-sector goals; and the presence of a commitment to proper implementation of legislation once enacted.¹⁷⁴ While Maine certainly has talented individuals in government and the public sector who could serve these roles, no high level staff or political leader has yet emerged to advocate for enhanced management of ocean or state coastal waters.

This analysis suggests that ocean governance which extends beyond the territorial sea is of relatively low priority to Maine, as the factors conducive to an ocean management initiative, particularly the immediate threat of undesirable development in federal waters, are not present. However, the factors to initiate and sustain efforts to manage the state's coastal waters are much more favorable. Popular appreciation of the state's coastal heritage and governmental preparedness to undertake coastal waters planning are present. Awareness of coastal problems is escalating. A focusing event and political leadership may coalesce in the near future to make management of this public resource a high priority for policy makers.

In the meantime, there are certain actions the state can undertake to increase its readiness to respond to the inevitable demand for marine water management. The Cicin-Sain study identified attributes of successful state management capacity.¹⁷⁵ It concluded the "most difficult" but unavoidable threshold requirement for such management capacity is the development of "an authoritative, normative statement about a state's interest and preferences" in marine waters with a well-defined implementation process.¹⁷⁶ The study observes:

The policy objectives need to be stated in sufficient detail so that they are an effective guide to action. This will require reference to specific ocean uses, reference to ocean zones, and prioritization, whenever possible. Policy objectives that state the rationale behind them and their ultimate purpose give decision makers clearer guidance. . . .

Developing policy statements will require coming to grips with values about the ocean. Is a multiple use philosophy possible? If so, how is it achieved in a fluid environment? Can the ocean be divided into zones for different activity, similar to what has been done in land use control? Are performance standards required?

174. CICIN-SAIN ET AL., *supra* note 31, at 22.

175. *Id.* at 27.

176. *Id.*

Can human use co-exist with environmental restoration? Who pays the costs?

For the policy statement to work it must be linked closely to an implementation scheme, so that it gets used in decision-making.¹⁷⁷

These observations, while made in an ocean management context, are equally true of management of the state's coastal waters. As discussed above, the policy statements incorporated in Maine's existing laws and regulations are insufficient to meet this important threshold readiness requirement because they are ambiguous and fail to provide any basis for tradeoffs or prioritization among uses.¹⁷⁸ In 1992, Maine's Marine Policy Committee also identified this as a major shortcoming.¹⁷⁹ It recommended that the state government, with input by environmental and economic interests, develop "a clearly articulated comprehensive policy for the state's marine waters" to "establish goals, objectives, and priorities to guide marine research, resource management, and environmental regulation in the marine environment."¹⁸⁰ As a starting point, it suggested eight general criteria that could form the underpinnings of such a comprehensive policy: the promotion of the sustainable use of the marine environment; the equitable distribution among the people of the state of the socio-economic benefits derived from the marine environment; the accommodation of multiple uses while minimizing conflicts among competing users; the grant of priority to the management and protection of living resources over non-living, non-renewable resources; the protection of the ecological integrity of state's marine waters for use by future generations; the establishment of a process for resolution of conflict between existing policy mandates; the promotion of research in the Gulf of Maine through Maine's Marine Research Board and other research organizations; and the preservation of Maine's maritime heritage.¹⁸¹

These well-conceived criteria constitute a necessary and important first step in moving toward an eventual comprehensive policy for the state's marine environment. They acknowledge the existence of use conflicts and the need to identify priorities. They also start to make the transition from perceiving use conflicts as a physical space allocation issue to viewing

177. *Id.* at 27 (citations omitted).

178. *See supra* Part III.B.

179. CATENA ET AL., *supra* note 31.

180. *Id.* at 67.

181. *Id.*

them in the broader context of resource allocation decisions. They stress stewardship over single-sector management.

However, limitations should be noted. Maine has taken no formal action to accept these criteria; they remain the recommendations of a report prepared for a subcommittee of the executive branch Land and Water Resources Council. They assign priority to management and protection of living resources over non-living, non-renewable resources, but do not make recommendations on how to assign priorities and minimize conflicts beyond these broad categories. They do not identify the need to address problems posed by concurrent federal, state and local jurisdiction. They leave to a later time the hard questions of how to operationalize key concepts such as equitable distribution, ecological integrity and accommodation of multiple uses. The experience of other coastal states, discussed below, may provide some guidance on how to make and implement these difficult choices.

IV. ANALYSIS OF SELECTED CONFLICT RESOLUTION: MECHANISMS FROM OTHER STATES

The preceding sections illustrate the overarching difficulties in management of coastal waters: the complex jurisdictional split among levels of government; the traditional narrow sector-by-sector approach to management of marine resources and uses; and the absence of either clear policies or a decision-making framework to establish marine resource use and allocation priorities.¹⁸² Decisions about valuable public resources are frequently made using less than optimal methods: by default, deferring to the first entity to assert a right to use a particular marine resource; by litigation, with courts ruling only on very narrow fact-specific issues before them; or by ad hoc legislative actions, readjusting the allocation among user groups in response to lobbying efforts spearheaded by those groups with the greatest financial stake in a particular resource.

These decisions frequently give the public interest little express consideration, assuming it has been or will be factored in through the give and take of the legislative process. Given the historical reticence of states to assert their full fiduciary authority as trustee of coastal waters, this is often a faulty assumption. As a result, the public interest, which should be the primary consideration, is given short shrift.

182. See also Robert W. Knecht et al., *National Ocean Policy: A Window of Opportunity*, 19 OCEAN DEV. & INT'L L. 113, 134-35 (1988).

To begin to make hard decisions about the most appropriate allocation of public resources, state governments must develop the capacity to assess the impacts of actions taken in one sector on another sector. These cross-cutting space, use, and resource allocation decisions should be made within the context of a state-wide comprehensive, long-range plan for the marine environment. This plan should articulate guiding principles which grow from a public consensus on overall priorities and goals for this public resource. For example, these principles might include a preference for nonexclusive uses and reversible commitments of space and resources, a preference for water-dependent uses, protection of habitat and bio-diversity, and a precautionary approach which places the burden upon those who seek to exploit a resource to prove that there will be no unreasonable interference with other coastal waters uses and resources.¹⁸³ But the state will have to go beyond general principles to develop implementation systems.

Several states have already begun the process of formulating more detailed plans and priority systems to manage their coastal waters. Some advances have been process oriented, such as clarifying jurisdiction, encouraging collaborative or integrated approaches to managing conflicts, or developing protocols and frameworks as a methodology for systematic conflict resolution. Other initiatives have employed specific management mechanisms to make substantive changes. The following section highlights some of the more promising mechanisms, divided into three primary types of approaches: (A) the clarification of authority between state and local governments; (B) the promotion of collaborative decision-making and implementation; and (C) the use of space and resource allocation systems.

A. Clarification of Authority Between State And Local Governments

One finding of the Maine case study is that limits on local authority to manage harbors and other waters within municipal boundaries are not clear. Maine municipalities have tended to focus on traditional mooring and vessel safety issues which are clearly within their jurisdiction. However, as use conflicts escalate, they may seek to expand their management efforts into less well-defined areas such as management of non-vessel or non-

183. See Jack H. Archer & M. Casey Jarman, *Sovereign Rights and Responsibilities: Applying Public Trust Principles to the Management of EEZ Space and Resources*, 17 OCEAN AND COASTAL MGMT. 253, 265 (1992).

harbor conflicts. There is no authorizing legislation which defines the range of local control for the State of Maine, nor are there mechanisms to ensure that local decisions promote the state-wide public trust interest.

Maine's communities often pattern their harbor management plans after a Connecticut model,¹⁸⁴ but they have done so in reliance on general home rule powers, without benefit of Connecticut's enabling legislation.¹⁸⁵ Connecticut's laws clearly delineate the relationship of the harbor management commission to other local boards and state agencies, incorporate mechanisms to foster local, state and federal coordination, and address enforcement authority.¹⁸⁶ For example, as a mechanism to transfer the state authority to the municipality, the state commissioners of environmental protection and transportation must approve the proposed harbor management plan before it may be adopted by the municipality.¹⁸⁷ The local plan will not be approved unless it is in compliance with state-wide resource goals established in Connecticut's Coastal Management Act.¹⁸⁸ In addition, to identify any federal concerns, prior to adoption the proposed plan must be submitted to the U.S. Army Corps of Engineers for comment.¹⁸⁹ Upon adoption of the approved plan, the harbor management commission may request a general permit from the U.S. Army Corps of Engineers and a delegation of enforcement authority from the Connecticut Department of Environmental Protection.¹⁹⁰

Connecticut's harbor management scheme requires municipalities to engage in detailed planning for a water area and for land-side uses that will impact the water.¹⁹¹ The plan should address water uses such as moorings and anchorages, channels, boat basins, limits on areas for persons living aboard, no discharge zones, swimming areas, wildlife preserves, shellfish beds, and recreational and commercial fishing areas.¹⁹²

Like Connecticut, the State of North Carolina has also granted political subdivisions express authority over coastal waters. In 1983, North Carolina

184. See CONN. DEP'T OF ENVTL. PROTECTION, MODEL MUNICIPAL HARBOR MANAGEMENT PLAN (1985) (reprinted in full by Maine Coastal Program, for distribution in Maine).

185. CONN. GEN. STAT. ANN. § 22a-113k to 113t (West 1995).

186. For more specific coordinating and jurisdictional provisions, see *id.* § 22a-113k(a), 113k(c), 113m, 113n, 113o, 113p.

187. *Id.* § 22a-113m.

188. *Id.* §§ 22a-90 to 113c.

189. *Id.* § 22a-113m.

190. *Id.* § 22a-113q.

191. CON. GEN. STAT. ANN. § 22a-113n, 113o.

192. CONN. DEP'T OF ENVTL. PROTECTION, *supra* note 184, at 10.

amended its general zoning enabling act to give coastal counties the power to regulate development in coastal waters within their jurisdictional boundaries and outside city limits, stating "[a] county may regulate the development over estuarine waters and over lands covered by navigable waters owned by the State . . . within the bounds of that county."¹⁹³ Unlike Connecticut, North Carolina does not require state approval of the plan before the delegated jurisdiction over state-owned lands becomes effective.¹⁹⁴

New York has taken a slightly different approach to delegating authority over water uses to its political subdivisions. In 1992, to responsibly manage the state's proprietary interests in state-owned underwater lands, New York amended its waterfront revitalization program to expand and standardize the authority of local governments to regulate the use of surface waters and underwater lands.¹⁹⁵ The legislation grants local governments the authority to adopt a "comprehensive harbor management plan" and implementing ordinances as part of a local waterfront revitalization plan.¹⁹⁶ The harbor management plan and implementing ordinances do not take effect until they are submitted to and approved by New York's Secretary of State.¹⁹⁷ Upon state approval, the municipality gains two additional benefits: all state agency actions must be consistent with the approved local waterfront revitalization plan to the maximum extent practicable,¹⁹⁸ and if so provided in the plan, the municipality acquires the authority to regulate everything "abounding" the municipality to a distance

193. N.C. GEN. STAT. § 153A-340 (Michie 1996). Due to increased use conflicts and uncertainty about local jurisdiction, North Carolina's legislature has also granted all municipalities in coastal counties the power to regulate swimming, surfing and littering within its boundaries and within the "extraterritorial jurisdiction," and granted some listed municipalities the right to regulate personal watercraft. *Id.* § 160A-176.1, 176.2. "Extraterritorial jurisdiction" allows a municipality to opt to increase the area subject to municipal zoning and land use regulation by up to three miles, depending on population size. It has been used by some municipalities to extend jurisdiction into the Atlantic Ocean. WALTER F. CLARK & STEVEN E. WHITESSELL, NORTH CAROLINA'S OCEAN STEWARDSHIP AREA: A MANAGEMENT STUDY 5 (1994).

194. WALTER F. CLARK, NORTH CAROLINA'S ESTUARIES: A PILOT STUDY FOR MANAGING MULTIPLE USE IN THE STATE'S PUBLIC TRUST WATERS 19 (Albermarle-Pamlico Study Report 90-10, 1990).

195. 1992 N.Y. Laws 791 (effective Aug. 7, 1992).

196. N.Y. EXEC. LAW § 911 (McKinney 1996).

197. *Id.* § 922.

198. *Id.* § 915(8).

of 1,500 feet from its shore, even if that exceeds the town's historic legal boundaries.¹⁹⁹

The local waterfront revitalization plan must address problems of conflict, congestion and competition for space in the use of harbors, surface waters and underwater lands.²⁰⁰ It must consider regional needs; competing needs of shipping, boating, fishing and shellfishing, aquaculture, waste management, mineral extraction, dredging, public access, and recreation; habitat, resource protection, water quality, open space, aesthetic values, riparian or littoral rights and the public interest in submerged lands.²⁰¹ The implementing ordinances may regulate: wharves, docks, moorings, piers and other structures, temporary or permanent, in, on or above waters; the use of surface waters; and the use of underwater lands.

The mechanism for clarifying the local authority to manage nearshore or harbor waters and integrating that authority with state fiduciary responsibilities for coastal waters will have to be tailored to the state's coastal management framework. But these examples include some important innovations. For example, Connecticut and New York include a state review and approval process to ensure that local plans and ordinances are consistent with state-wide and regional goals and priorities for public trust lands. Connecticut also requires a United States Army Corps of Engineers review, so that any obvious federal conflicts can be identified early in the process. New York gives municipalities incentives to develop harbor plans by requiring that state actions be consistent with an approved local plan. Finally, New York simplifies the issue of geographic reach of municipal boundaries and provides equal local authority by giving approved towns the right to regulate a set distance off-shore regardless of whether that exceeds historic town boundaries. These mechanisms clarify the authority of the local government to more aggressively manage these conflicts, while at the same time imposing overriding state guidelines to protect public trust interests.

199. *Id.* § 922(1).

200. *Id.* § 915.

201. *Id.*

*B. Promotion of Collaboration in Decision-Making
and Implementation*

An integrated, comprehensive, ecosystem-based approach is emerging as the ideal model for management of coastal waters.²⁰² However, one commentator has identified significant tension between the model of integrated management and the ideal of pluralism, observing that management segmentation has been valued as a means to foster full participation and interplay of interest groups in public debate.²⁰³ He asserts this governance structure may itself present a serious impediment to integrated management.²⁰⁴

Similarly, another coastal expert cautions that the "alluring concept of a 'comprehensive policy'" may not always be attainable, not only for political reasons but because certain segments of marine policy evaluation may be "better served by accepting single-sector solutions . . . than by dashing headlong on a perhaps quixotic course toward attaining comprehensive, wholly integrated policy."²⁰⁵ Rather than focusing on integration through centralization, it may be more productive to pursue coordinated, integrative solutions which enhance the ability to address conflicts among

202. Ames Borden Colt, *The Challenges of Integrated Estuarine Management in the United States*, 22 COASTAL MGMT. 369, 372 (1994).

203. *Id.*

204. *Id.* at 378. In asserting that this governance structure may present a serious impediment to integrated management, the author observes:

The segmentation of most U.S. natural resource management agencies and programs according to traditional or economically important uses derives in large part from the United State's [sic] system of federalist democracy

To provide adequate representation of competing social interests in public policy making, American pluralism has encouraged the diffusion of jurisdictional and statutory authority among multiple, relatively independent government entities, each devoted to the furthering of a major social interest or value

. . . .

However, achieving consensus becomes increasingly difficult as each agency or management program becomes entrenched in the advocacy of a particular set of values or a narrow range of possible solutions. In estuarine management, where integrated approaches are often critical to realizing management goals, interest group conflict and management segmentation emerge as serious impediments.

Id.

205. Harry N. Scheiber, *Since the Stratton Commission Report: Policy Studies in Ocean Governance, 1969 and 1992*, in OCEAN GOVERNANCE: A NEW VISION 19, 20 (Biliana Cicin-Sain ed. 1992) [hereinafter OCEAN GOVERNANCE].

sectors and make trade offs among those activities.²⁰⁶ Thus, even if a wholly integrated coastal policy is not the immediate goal, a state's capacity to manage its coastal waters should be enhanced by improving the process for multiple single-sector agencies to coordinate with one another on cross-cutting decisions.

I. State Interagency Coordination

Prospects for successful integrated management are increased if actions taken by multiple state agencies are consistent with each other and if they further overriding management principles. The State of Maine relies on its Land and Water Resources Council, a body composed of the commissioners of eight departments and the director of the State Planning Office, to provide this coordination.²⁰⁷ The Council is charged with advising the governor, legislature and state agencies on management policies, including specific land and water resources management issues of state-level significance.²⁰⁸ However, since 1994, most of its efforts have been focused on responding to a legislative mandate that it assess consolidating multiple land-based resource protection laws.²⁰⁹

In contrast, Oregon has more aggressively focused on improving intergovernmental coordination as part of its ocean resources management plan.²¹⁰ As one component, it has created an Ocean Policy Advisory Council.²¹¹ Unlike Maine's council, which is charged with oversight of land and water, this body is focused on ocean and territorial sea management issues. Oregon's council is also more broadly representative; in addition to state agencies, it includes a county commissioner, elected city official, and ocean users representative of commercial fisheries, recreational fisheries, port navigation or transportation, non-fishing recreation, environmental organizations, Oregon Indian tribes, small ports, and the general public, all appointed by the Governor for four year terms.²¹² The council operates with the assistance of a permanent scientific and technical

206. Kem Lowry, *Caveats on 'Integration' in Ocean and Coastal Management*, in OCEAN GOVERNANCE, *supra* note 205, at 32.

207. ME. REV. STAT. ANN. tit. 5, § 3331(1) (West Supp. 1996).

208. *Id.* § 3331(2).

209. *Id.* § 3331(3).

210. *See infra* Part IV.C.5.

211. OR. REV. STAT. § 196.438 (1995).

212. *Id.*

advisory committee.²¹³ It was charged with preparing a territorial sea management plan and coordinating interagency actions such as by providing a forum for discussions, mediating disagreements, and coordinating interagency review of specific projects through project review panels (PRPs).²¹⁴ The council is also responsible for encouraging federal agencies to participate in resolution of ocean resources issues affecting the state.²¹⁵

Oregon's project review panel mechanism is designed to facilitate more effective and efficient dispute resolution in review of specific ocean resource development proposals.²¹⁶ A PRP does not have new or independent authority, but it will coordinate the review and make recommendations on permit approval or denial, permit conditions, performance standards, lease stipulations, and mitigation measures.²¹⁷ While a participating agency is not legally bound by the recommendations of the PRP, it is intended that its actions will be consistent with those recommendations; any agency that does not accept the recommendation must provide the Ocean Policy Advisory Council with written findings and conclusions to support its position.²¹⁸

Maine and Oregon probably represent two ends of the spectrum of possible intra-state coordinating mechanisms. Several other states have implemented or recommended similar coordinating mechanisms. For example, North Carolina's ocean management inventory recommended the creation of an interagency management committee to coordinate sectoral policies, clarify jurisdictional conflict, recommend legislative and rules changes, and initiate interagency memoranda of agreement.²¹⁹ California's Resources Agency recommended the creation of a cabinet-level ocean

213. *Id.* § 196.451.

214. *Id.* § 196.443.

215. *Id.* § 196.443(f).

216. OR. OCEAN RESOURCES MANAGEMENT TASK FORCE, *supra* note 38, at 168. A Project Review Panel is to be used when there is no other effective mechanism for interagency project review and coordination, or when the expertise or authority of several agencies is required to review a large, complex project or several related projects. *Id.* California has also used a similar technique in connection with proposed offshore energy projects, to oversee preparation of an environmental impact assessment document which would satisfy federal, state and local environmental regulations. James Lima & Michael McGinnis, *California Ocean Use Management: An Assessment of Two Integrating Approaches*, in INT'L PERSP. ON COASTAL OCEAN SPACE UTILIZATION, PROC. FROM THE SECOND INT'L SYMP. ON COASTAL OCEAN SPACE UTILIZATION 705, 708-711 (1993).

217. OR. REV. STAT § 196-453 (1995).

218. OR. OCEAN RESOURCES MANAGEMENT TASK FORCE, *supra* note 38, at 169.

219. CLARK & WHITESELL, *supra* note 193, at 54.

resources management coordinating council.²²⁰ This council would coordinate state agencies and programs, and eventually improve coordination with other levels of government and other public and private groups.²²¹ All of these methods attempt to coordinate at least the state's own agencies and utilize existing agencies, perhaps on the theory that it is less problematic than creating a new state agency in charge of the marine environment. It is likely that the success of these interagency coordinating efforts to develop a holistic marine policy will be directly proportional to the level of political commitment and to the institutional resources invested.

2. *Federal/State Coordination*

Coastal experts suggest that in the near term, it is unlikely that the federal government will reorganize itself into an overarching agency to promote integrated coastal and ocean management, thus it falls to the states to initiate comprehensive coastal and ocean management.²²² Where concurrent state and federal jurisdiction is involved, it is in the states' interest to work in tandem with federal agencies.

When state and federal goals are compatible, the same types of coordinating mechanisms used within a state can be extended to include federal agencies.²²³ In fact, cooperative ventures spanning federal/state jurisdictional barriers occur with great frequency. For example, resource agencies such as National Marine Fisheries Service and U.S. Fish and Wildlife Service, the U.S. Coast Guard, U.S. Environmental Protection Agency and the Army Corps of Engineers routinely collaborate with state and local agencies on issues such as habitat protection, marine debris, dredging, and regulation of anchoring to further mutual goals.²²⁴

On the other hand, if the state and federal goals are in conflict, the state will have to use other techniques to gain federal agency acceptance of state

220. THE RESOURCES AGENCY OF CAL., *supra* note 49, at 6-1.

221. *Id.*

222. See Mark B. Adams & Scott T. McCreary, *Institutional Arrangements for State Coastal Management Programs: Some Strengths and Weaknesses*, in 3 COASTAL ZONE '89: PROC. OF 6TH SYMP. ON COASTAL AND OCEAN MGMT. 2558, 2569 (Orville T. Magoon et al. eds., 1989).

223. See *supra* Part IV.B.1.

224. For example, in the Monterey Bay National Marine Sanctuary, a court upheld NOAA regulations limiting use of personal watercraft to supplement uneven local regulations. *Personal Watercraft Indus. Ass'n v. Department of Commerce*, 48 F.3d 540 (D.C. Cir. 1995).

goals for state coastal waters. The most promising technique for states is to use the federal consistency provisions of the Coastal Zone Management Act.²²⁵

While the precise scope is still subject to controversy,²²⁶ these federal consistency provisions generally give each state with an approved coastal management program authority to review certain "federal activities"²²⁷ that affect the coastal zone to ensure that they are consistent with the enforceable policies of the state's coastal management program, to the maximum extent practicable.²²⁸ Consistency reviews apply to federal activities conducted within the coastal zone²²⁹ or conducted outside the zone but which affect land or water use or natural resources of the state's coastal zone.²³⁰ Under certain conditions, a state may also be able to review the activities of a second state that impact the first state's coastal zone.²³¹ However, it is not enough for the state to have a general plan or goals for the coastal zone. Consistency compliance is not required unless those plans or goals are implemented by the state through enforceable policy provisions.²³² Much of the ocean management planning of the "activist states,"

225. 16 U.S.C. § 1456(c)(1)(A) (1994).

226. See Mark T. Imperial & Jessica Cogan, *The Evolution of the Federal Consistency Provisions: The Controversy Continues*, in COASTAL ZONE '93: PROC. OF 8TH SYMP. ON COASTAL AND OCEAN MGMT. 3048 (1993).

227. Activities subject to review include: direct federal activities, federally licensed or permitted activities, outer continental shelf activities on area leased under the Outer Continental Shelf Lands Act, or actions of state and local governments which are the subject of applications for federal assistance. 15 C.F.R. §§ 930.35, .53, .54, .70, .90 (1995).

228. The consistency provisions vary slightly depending upon whether the proposal involves a direct federal activity or development project, a federally licensed or permitted activity, or federal assistance to state or local governments. To proceed, direct federal actions and federal development projects located in the coastal zone must be "consistent to the maximum extent practicable with enforceable state policies" while federally licensed and permitted activities and federal assistance to state and local governments must "compl[y] with" or be "consistent with" the "enforceable policies" of the approved state program. 16 U.S.C.A. § 1456(c)(1)-(3) (West 1986 & Supp. 1997).

229. This varies by state, but includes the area from the inland boundary of the state-designated coastal zone to the outer limit of the U.S. territorial sea.

230. 15 C.F.R. § 930.33(c)(1) (1995).

231. *City of Virginia Beach v. Brown*, 858 F. Supp. 585 (E.D. Va. 1994) (attempt by North Carolina to conduct federal consistency review of proposed activity wholly in Virginia but arguably affecting North Carolina's coastal zone dismissed on grounds of mootness without reaching substantive question).

232. Enforceable policies are defined as "[s]tate policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decision, by which a [s]tate exerts control over private and public land and

catalyzed by the threat of development in federal waters, is designed to take maximum advantage of federal consistency leverage.²³³

3. *Creation of New Entities*

A third approach to promote collaborative decision-making in coastal waters is through the creation of new institutional entities to cut across traditional political boundaries. This is frequently necessary because of a mismatch between the boundaries of political subdivisions and the boundaries of environmentally-defined regions such as ecosystems, watersheds or landscapes.²³⁴

During the last decade, various federal and state agencies have created new entities to transcend traditional political boundaries and formalize management of ecosystem-based areas.²³⁵ They have utilized a variety of techniques including common legislation adopted by adjacent entities,²³⁶ regional councils or task forces,²³⁷ interstate compacts,²³⁸ and voluntary

water uses and natural resources in the coastal zone." 16 U.S.C. § 1453(6a) (1994). If a federal activity is not addressed by an enforceable policy, it is presumed to be consistent and a consistency review is not necessary. Enforceable policies have to be approved by NOAA as part of the state's coastal program.

233. CICIN-SAIN ET AL., *supra* note 31, at 16.

234. For a more complete discussion of the mismatch between boundaries of the decisions and of the impact, see, for example, FRANCES IRWIN & BARBARA RODES, MAKING DECISIONS ON CUMULATIVE ENVIRONMENTAL IMPACTS: A CONCEPTUAL FRAMEWORK 17-23 (1992).

235. See OFFICE OF WATER, U.S. ENVTL. PROTECTION AGENCY, THE WATERSHED PROTECTION APPROACH (1991); COASTAL AMERICA, TOWARD A WATERSHED APPROACH: A FRAMEWORK FOR AQUATIC ECOSYSTEM RESTORATION, PROTECTION, AND MANAGEMENT (1994).

236. GULF OF ME. WORKING GROUP, COUNCIL ON THE MARINE ENV'T, FORMALIZING THE GULF OF MAINE INITIATIVE: INSTITUTIONAL ARRANGEMENTS FOR IMPLEMENTING THE GULF OF MAINE INITIATIVE 3 (1991).

237. See e.g., COUNCIL ON THE MARINE ENV'T, *supra* note 167. (this Council was created to develop a regional marine environmental quality monitoring plan when the governors of Maine, Massachusetts and New Hampshire and the premiers of New Brunswick and Nova Scotia signed the "Agreement on Conservation of the Marine Environment of the Gulf of Maine Between the Governments of the Bordering States and Provinces"); British Columbia/States Oil Spill Task Force, created by "Oil Spill Memorandum of Co-operation Between the Province of British Columbia, the State of Washington, the State of Oregon, the State of Alaska, and the State of California," (June 1989); St. Croix International Waterway Commission, created by "Memorandum of Understanding Between the State of Maine of the United States and the Province of New Brunswick of Canada Regarding the St. Croix International Waterway," (Nov. 17, 1986).

238. See, e.g., Northwest Electric Power and Conservation Planning Council (created

cooperation among multiple local, state and federal agencies such as through the National Estuary Program.²³⁹ These institutional adjustments can enhance the ability to manage territorial sea resources by redefining what might otherwise be inappropriate boundaries for scientific study, monitoring and management.

4. *Alternative Dispute Resolution*

A final institutional adjustment to promote coordinated decision-making is through the use of alternative dispute resolution (ADR) techniques designed to avoid formal adjudicatory processes. Informal ADR techniques, such as public information gathering hearings and informal meetings between staff and applicants, are utilized continuously, usually without labeling them as such. But natural resource allocation disputes are also making growing use of more formal ADR techniques to find common ground among conflicting user groups.²⁴⁰

For example, North Carolina has focused on a variety of ADR efforts to resolve disputes between commercial and recreational fishermen.²⁴¹ These efforts have included: structured meetings facilitated by the National Park Service between recreational anglers and commercial fishermen for a lake-sized tidal pool;²⁴² professional mediation of fisheries disputes;²⁴³

by interstate compact between Idaho, Montana, Washington and Oregon, and with Bonneville Power Administration Pacific Northwest Electric Power Planning and Conservation Act), 16 U.S.C. § 839 (1994). See also HARRY BADER, POTENTIAL UTILITY OF AN INTERSTATE COMPACT AS A VEHICLE FOR OIL SPILL PREVENTION AND RESPONSE, SPILL—THE WRECK OF THE EXXON VALDEZ app. M (Univ. of Alaska Sea Grant Legal Research Team 1989).

239. 33 U.S.C. § 1330 (1994).

240. See JOSIE QUINTRELL & GRO FLATEBO, *Alternative Dispute Resolution, in* OPTIONS FOR MANAGING MAINE'S NEAR SHORE ECOSYSTEMS, *supra* note 166, at 1-2; Richard G. Hildreth, *The Public Trust Doctrine and Conflict Resolution in Coastal Waters: West Coast Developments*, in 3 COASTAL ZONE '89: PROC. OF 6TH SYMP. ON COASTAL & OCEAN MGMT., *supra* note 222 at 2604. (discussing techniques for managing conflicts including prioritizing marine uses; multiple-use planning; activity schedules, corridors and buffer zones reached through negotiations; and coordinated federal and state review).

241. *Panel Discussion of Use Allocation at Hatteras Point/Pond: A Case Study*, in FINDING COMMON GROUND, PROC. FROM THE THIRD N. C. MARINE RECREATIONAL FISHING FORUM 21 (1994).

242. *Id.*

243. See Andy Sachs, *Professional Mediation*, in *id.* at 37.

and the use of educational forums to attempt to identify common interests and mitigate user conflicts.²⁴⁴

ADR is particularly promising where multiple agencies or user groups, with overlapping jurisdiction and interests, are interested in the same project or limited resource.²⁴⁵ As individuals gain more experience with the different techniques and as the justice system, in general, embraces ADR, its role in the marine context will grow.

C. Space and Resource Allocation Systems

In addition to the institutional adjustments and cooperative mechanisms discussed immediately above, states are also employing more substantive planning initiatives and regulatory systems to resolve conflicts. Since each state has the flexibility to weigh its own social values and develop its own hierarchy among permissible public trust uses, there is considerable variation from state to state, not only in techniques employed, but also in value assigned to different uses.²⁴⁶

Some substantive mechanisms include: physical space allocation systems performance standards, and a combination of space allocation systems and more comprehensive management and planning. Among the more promising allocation techniques are submerged lands leasing programs, marine zoning, special area management plans, performance standards and ocean management plans.

1. Submerged Lands Leasing Programs

Submerged lands leasing programs can help minimize use conflicts in coastal waters by requiring users who propose permanent occupancy of state coastal waters to first obtain a lease or other conveyance from the state. These programs typically control only built infrastructure or physical changes in, on, or over submerged lands, such as permanent structures or dredging, and are not designed to control temporary or transient uses such as seasonal docks, recreational use, or capture fisheries.

Many states have one or more submerged lands leasing statutes. Some are single-purpose statutes, applicable only to one use such as aquacul-

244. *Introduction*, in *id.* at 1.

245. QUINTRELL & FLATEBO, *supra* note 240, at 12.

246. ARCHER ET AL., *supra* note 29, at 101.

ture;²⁴⁷ others are generic and control a broad range of uses.²⁴⁸ Typically, the submerged lands lease program is not the only governmental oversight of the proposed development. A development program will usually need other local, state or federal regulatory permits as well.²⁴⁹

The submerged lands leasing statutes utilize a variety of provisions to minimize potential conflicts with other public trust uses. Programs usually limit the term of the lease, and the size and character of the lease area. Some statutes explicitly reserve the most productive areas for general public use.²⁵⁰ Leasing programs generally have specific review criteria to determine whether the proposed use will have unacceptable adverse impacts on public trust uses of the remaining lands.²⁵¹ For example, lease

247. See FLA. STAT. ANN. § 253.68 (West 1991); ME. REV. STAT. ANN. tit. 12, § 6072 (West 1981 & Supp. 1997); R.I. GEN. LAWS § 20-10-1 (Michie 1989).

248. See DEL. CODE ANN. tit. 7, §§ 7201-7216 (Michie 1991 & Supp. 1996); ME. REV. STAT. ANN. tit. 12, § 558-A (West 1994 & Supp. 1997); OR. REV. STAT. § 274.005(7), (8) (1995); TEX. NAT. RES. CODE ANN. §§ 33.001-.176 (West 1978 & Supp. 1996-1997); WASH. REV. CODE ANN. § 79.90.455 (West 1991 & Supp. 1997).

249. For example, in Washington State, a proposed use of aquatic land will require both an Aquatic Lands Lease from the Department of Natural Resources and a county or city Shoreline Substantial Development local permit. WASH. REV. CODE ANN. §§ 79.90.010-90, 902, 90.58.010-.58.930 (West 1991 & Supp. 1997). Similarly, in Hawaii, an applicant will need a use approval from the conservation district and a lease. HAW. REV. STAT. §§ 190D-1 to -36 (1993). Specific uses will frequently need to comply with additional state programs regulating water quality and other aspects of the use.

250. For example, naturally productive shellfish areas are often not available for lease by private entities; the intent of the leasing program is not to lessen the availability of the resource to the general public but rather to supplement the resource by allowing exclusive use of areas which could become productive with private stewardship. Timothy Eichenberg & Barbara Vestal, *Improving the Legal Framework for Marine Aquaculture: The Role of Water Quality Laws and the Public Trust Doctrine*, 2 TERRITORIAL SEA J. 339, 368 (1992). Washington State specifies that the state may decline to lease lands with significant natural values. WASH. REV. CODE ANN. § 79.90.460(3) (West 1991 & Supp. 1997-1998). Florida directs that leases shall not displace viable commercial or recreational harvesting areas open to the general public. FLA. ADMIN. CODE ANN. r. 18-21.004 (1997).

251. For a discussion of Maine's criteria, which use specific standards to operationalize concepts of when a proposed use will be contrary to the public interest, see *supra* Part III.B.2. In contrast, Florida specifies that to be in the public interest, a proposed private use must have:

Demonstrable environmental, social, and economic benefits which would accrue to the public at large as a result of a proposed action, and which would clearly exceed all demonstrable environmental, social, and economic costs of the proposed action. In determining the public interest in a request for use, sale, lease, or transfer of interest in sovereignty lands or severance of materials from sovereignty lands, the board shall consider the ultimate project and purpose to be served. . . .

programs may be directed to approve uses only if they provide certain types of public benefits,²⁵² if the public benefits will "clearly exceed all demonstrable environmental, social, and economic costs,"²⁵³ or only if the proposed use will be compatible with lawful public uses including navigation, fishing, and recreation and will not impinge upon the rights of riparian owners.²⁵⁴ If a lease is granted which permits private occupancy of public lands, most states require that the leased area remain available for other public trust uses such as recreation, capture fishing, and navigation to the extent they are not inconsistent with the purpose for which the lease was granted.²⁵⁵

These submerged lands lease programs vary considerably in their allocation mechanisms. Some programs allow upland owners or local governments to veto proposed leases even though they would be consistent with the state-wide interest in the use of public trust lands.²⁵⁶ A few lease programs employ competitive bid mechanisms to select the lessee once it has been determined that a particular space will be leased to some private entity for a particular purpose.²⁵⁷

FLA. ADMIN. CODE ANN. r. 18-21.003(38) (1990).

252. Washington encourages a balance of public benefits including direct public use and access, fostering of water dependent uses, environmental protection, and utilization of renewable resources. WASH. REV. CODE ANN. § 79.90.455 (1991); WASH. ADMIN. CODE § 173-16-060(2) (1997). If there are leasing conflicts between water dependent uses, priority is to be given "to uses which enhance renewable resources, water-borne commerce, and the navigational and biological capacity of the waters, and to state-wide interests as distinguished from local interests." WASH. REV. CODE ANN. § 79.90.460(1) (West 1991 & Supp. 1997-1998).

253. FLA. ADMIN. CODE ANN. r. 18-21.003(40) (1997).

254. N.C. GEN. STAT. § 113-202(a) (Michie 1997).

255. For example, Florida's aquaculture leasing provisions provide that except when necessary to permit the effective development of the species being cultivated, the public shall have reasonable access to the leased area for traditional water activities such as swimming, boating and fishing. FLA. STAT. ANN. § 253.72 (West 1991). The burden is on the lessee to clearly post all limitations on public use authorized by the lease. *Id.* Hawaii also authorizes specific provisions in the lease to minimize the impact on public trust uses, including requiring lanes for navigation through the leased site if feasible and posting notice of any limitation of use. HAW. REV. STAT. § 190D-11 (West 1993).

256. Eichenberg & Vestal, *supra* note 250, at 371.

257. In Washington, while most lease fees are set in accordance with the assessed value of the adjacent upland, aquaculture lease fees are established through competitive bidding or negotiation. WASH. REV. CODE ANN. §§ 79.90.490, .90.490 (West 1991 & Supp. 1997-1998). Hawaii has the option to use an auction process to allocate space for aquaculture facilities once approval has been granted for an aquaculture use in that location. HAW. REV. STAT. § 190D-22 (1993). Similarly, Oregon can use a competitive bidding

However, despite the variation, all of the programs have the potential to reduce multiple use conflicts in coastal waters by: (1) reminding users that the lands are public and subject to state management, (2) creating a revenue stream to enhance the management of public lands, and (3) allowing the state to control permanent uses of coastal waters by approving, approving with conditions, or disapproving a proposed use.

The effectiveness of the program as a conflict resolution mechanism will depend upon how comprehensively the state has developed its decision-making framework. If the state has not engaged in much coastal waters management planning, decisions may be ad hoc and based purely on space allocation criteria. In states with more advanced planning and management for their coastal waters, these leasing decisions should also reflect state policies on use priorities and desired resource allocation.

2. *Marine Zoning*

In most states, there are already a plethora of spatial designations for coastal waters. A partial list might include military activity zones, navigational fairways and shipping lanes, dredge spoil disposal sites, marine sanctuaries, areas closed to certain types of fishing, water quality discharge areas, oil transfer areas, underwater cable areas and anchorage areas.²⁵⁸ These types of designations are, however, disjointed and generally address only a single activity. While not yet used extensively by many states or communities, there is growing interest in extending controls similar to traditional, comprehensive land-based zoning into the water.²⁵⁹

As a threshold matter, efforts to zone the water must overcome certain complications such as: the three dimensional nature of the sea bed, water column, and water surface; the enforcement difficulty of ascertaining the

system if the riparian owner declines to exercise its preemptive right to lease the submerged land abutting its parcel at a specified minimum rent. OR. REV. STAT. § 274.040 (1995).

258. For example, a survey of North Carolina law found the following existing spatial designations: areas closed to specific fishery activities; areas closed to certain types of fishing techniques; military restricted areas; specific resource sanctuaries; and 750-foot buffer areas around ocean fishing piers. CLARK & WHITESELL, *supra* note 193, at 47-48.

259. For example, the Environmental Protection Agency recently included watersheet zoning (described as a technique to set aside areas of a waterbody for separate uses such as navigation channels, mooring areas, and waterskiing) as a new coastal protection technique, noting that it has been used in a few communities but not yet extensively tested. OFFICE OF WETLANDS, OCEANS AND WATERSHEDS, U.S. ENVTL. PROTECTION AGENCY, COASTAL PROTECTION PROGRAM: WORKSHOPS IN INNOVATIVE MANAGEMENT TECHNIQUES FOR ESTUARIES, WETLANDS, AND NEAR COASTAL WATERS 6-3 (1996).

precise geographic location of a point in the water on the face of the earth; the difficulties of communicating physical boundaries with nautical charts or physical markers; and the "mobility of the fluid medium." However, the relative difficulties of zoning land and water may have been exaggerated²⁶⁰ and, at any rate, are certainly diminishing with advances in global positioning systems and sea bed mapping.

Marine zoning, involving essentially the same processes and regulatory approach as its terrestrial counterpart, can be used comprehensively to divide the entire coastal water area within its jurisdiction into various use and intensity categories.²⁶¹ Ideally, a water zoning scheme would be compatible with the natural features and important ecosystem functions of the waterbody, be coordinated with the zoning of the adjacent uplands, and recognize existing development and uses while stressing environmental conservation.²⁶²

Rhode Island, one the first states to use marine zoning as a component of its comprehensive land and water management system, established a state coastal permitting system in 1971. It requires a Coastal Resources Management Council (CRMC) assent for all new development activities in tidal waters, on the shoreline, or landward to within 200 feet of specified coastal features, and for specific, potentially high-impact development in any location.²⁶³ The program is built on water use categories which apply to all coastal waters of the state.²⁶⁴ Each water use category permits only certain uses, and the permissible upland activity is dictated by the adjoining water use category.

The overarching goal of Rhode Island's system is "preservation and restoration of ecological systems."²⁶⁵ That goal is implemented, to the extent feasible, by leaving undisturbed coastal areas in that condition, by

260. J.R. Schubel, *Clean-up, Conservation and Enhancement of the Coastal Ocean: A Confusion of Priorities*, in INT'L PERSP. ON COASTAL OCEAN SPACE UTILIZATION: PROC. FROM THE 2ND INT'L SYMP. ON COASTAL OCEAN SPACE UTILIZATION 645, 651 (Phyllis M. Grifman & James A. Fawcett eds., 1993). But see also RICHARD A. KENCHINGTON, *MANAGING MARINE ENVIRONMENTS* 38 (1990).

261. J.R. SCHUBEL, *ZONING: A RATIONAL APPROACH TO ESTUARINE REHABILITATION AND MANAGEMENT* 4 (Marine Sciences Research Ctr., State Univ. of N.Y. No. 75-4, 1975).

262. *Id.*

263. R.I. GEN. LAWS § 46-23-6 (Michie 1996 & Supp. 1997).

264. R.I. CODER. 04 000 020 (1994). The categories are: Type 1: conservation areas; Type 2: low-intensity use; Type 3: high-intensity boating; Type 4: multipurpose waters; Type 5: commercial and recreational harbors; and Type 6: industrial waterfronts and commercial navigation channels. *Id.*

265. R.I. GEN. LAWS § 46-23-1(a) (1996).

consolidating new facilities with like facilities, and by concentrating high-intensity development in areas where the shoreland had already been disturbed.²⁶⁶ Within each water use category, there are statements of priority to guide the CRMC.²⁶⁷

Washington State's Shoreline Management Act,²⁶⁸ also adopted in 1971, utilizes similar water classification techniques but allocates more responsibility to local government.²⁶⁹ The Act requires local governments to prepare and administer Shoreline Master Programs (SMP) and, pursuant to such programs, to issue shoreline development permits.²⁷⁰ The SMP must be consistent with the priorities and guidelines of the Shoreline Management Act, and local SMPs and shoreline development permits are reviewed by the Washington State Department of Ecology.²⁷¹

The SMP applies to "all marine waters of the state, together with the lands underlying them" from the shoreline outward to the city or county limit in the water and to upland areas extending inland a distance of 200 feet from the ordinary high water mark; it also applies to streams, rivers,

266. The water classification system is supplemented by specific standards for activities under council jurisdiction, including recreational boating facilities, houseboats and floating businesses, aquaculture, and municipal harbor regulations. The latter must be found to be consistent with the Coastal Resources Management Program. STATE OF R.I., COASTAL RESOURCES MANAGEMENT PROGRAM, *as amended*, 1990.

267. R.I. CODE R. 04 000 010 (1994). For example, for commercial and recreational harbors, it states:

[t]he highest priority uses of Type 5 waters and adjoining land areas within Council jurisdiction are (a) berthing, mooring, and servicing of recreational craft, commercial fishing vessels, and ferries; (b) water-dependent and water-enhanced commerce, including businesses catering to tourists; (c) maintenance of navigational channels and berths, and removal of obstructions to navigation; and (d) activities that maintain or enhance water quality and scenic qualities, including the preservation of historic features. The Council shall suitably modify or prohibit activities that significantly detract from or interfere with these priority uses.

Id. The management program utilizes special area management plans to further detail policies in Providence Harbor and coastal salt ponds.

268. WASH. REV. CODE ANN. §§ 90.58.010-.030 (West 1992 & Supp. 1997-1998).

269. *Id.* § 90.58.050.

270. *Id.* § 90.58.070, .58.140.

271. The SMP takes precedence over other local land use planning and zoning "since the Shoreline Management Act represents state-wide concerns and is based on the public trust doctrine protecting the rights of the people of the State of Washington." Washington State Department of Ecology, *Shoreline Master Program Handbook*, in SHORELINE MANAGEMENT GUIDEBOOK 93 (1990).

certain lakes and reservoirs.²⁷² All subtidal lands and certain intertidal lands are designated as "shorelines of state-wide significance." In these areas local governments must give particular preference to uses which protect state-wide interests over local interests.²⁷³

The primary tool for implementing the Shoreline Master Program is the classification of shorelines into specific "environmental designations."²⁷⁴ Similar to zoning, each designation is mapped and accompanied by a purpose statement, management policies, and matrices designating permitted uses, activities and intensity of development.²⁷⁵ However, it is not the precise equivalent of local land use zoning.²⁷⁶

Coastal submerged lands can be designated as one or more "aquatic environments" rather than classifying them as an extension of the upland environment. A community may divide its submerged lands into several different aquatic designations, such as aquatic harbor, aquatic navigation, and aquatic conservation.²⁷⁷

The state suggests sample aquatic environment management policies including: prohibiting structures which are not water-dependent, prohibiting uses which will substantially degrade the existing character of the area, requiring developments to be compatible with the adjoining upland, encouraging public access, minimizing interference with surface navigation, and minimizing adverse visual impacts.²⁷⁸ In addition, sample policies also address conflicts among water-dependent uses.²⁷⁹ Local governments

272. *Id.* at 3.

273. *Id.* at 56-58.

274. Typically these environmental designations might include natural, conservancy, rural, suburban, urban-maritime, urban, and aquatic, but local governments may add other categories. The first six would be upland designations. *Id.* at 106.

275. *Id.* at 93-94, 107.

276. The Department of Ecology recommends that the SMP be compatible with the local zoning code but be independent of it, and focus on water-dependency characteristics rather than on specific uses. *Id.* at 107.

277. Washington State Department of Ecology, *supra* note 271, at 128.

278. *Id.* at 128-129.

279. *Id.* For example, suggested sample policies include the following: aquaculture practices should be encouraged in those tidelands, waters and beds most suitable for such use; several industries using the same tideland facilities shall be given preference over single industry use; in appropriate areas, fishing and recreational uses of the water should be protected against competing uses that would interfere with those activities; all developments and activities using navigable waters of their beds should be located and designed to . . . allow for the safe, unhindered passage of fish and animals, particularly those whose life cycles are dependent on such migration.

are encouraged to modify these sample policies to reflect local conditions and opportunities.²⁸⁰

State guidelines also include sample best practices standards for specific shoreline use categories including aquaculture, boating facilities, mining, and floating homes. As in Rhode Island, the shoreland management system and classification of waters is designed to affect the issuance of permits for substantial development, thus, it only indirectly affects activities that do not require new facilities or alterations such as dredging or fill.

A variation developed in North Carolina recommends employing "marine zoning" as one tool to allow local governments to implement local plans consistent with more holistic state-wide guidelines.²⁸¹ Water use zoning maps would not be regulatory per se, but rather would illustrate where particular policies should be considered.²⁸² As illustrated in a North Carolina study for the Albemarle-Pamlico Estuary, a model water use classification system could divide coastal waters into discrete geographic areas. Additional specific ordinances, such as a marina siting ordinance, could refer to the water use classifications to identify those areas where marinas should be preferred, carefully scrutinized or discouraged.²⁸³

These water management systems in Rhode Island, Washington and North Carolina illustrate how terrestrial zoning methods can be adapted to comprehensively divide coastal waters into use and intensity classifications.²⁸⁴ Marine zoning can be used as one of several tools to implement

Id.

280. *Id.* at 128.

281. North Carolina's recommendations are based on an earlier model water use plan developed as part of the Albemarle-Pamlico Estuarine Study. CLARK, *supra* note 194. This model water use plan was developed for the public trust waters of Carteret County as one management option, to illustrate policies that might be developed through a water use planning process. *Id.* at 4. After developing a series of policy statements on resource protection, resource production, and other public trust uses, it employed a GIS system to develop and apply a simple water use classification system which divided public trust waters into three categories: preservation, conservation and developed. *Id.* at 4. These classifications are not envisioned as regulatory per se, but would control what type of use would be encouraged or discouraged. *Id.* These preferences would be implemented through special area management plans, such as local harbor management plans, which would make more detailed spatial divisions. *Id.* at 3-4.

282. Walter F. Clark, *Managing Multiple Use in U.S. Coastal Public Trust Waters*, in INT'L PERSP. ON COASTAL OCEAN SPACE UTILIZATION, *supra* note 260, at 655, 659.

283. *Id.* at 662.

284. Other countries also experimenting with marine zoning include Australia and Norway. Richard G. Hildreth, *Learning from Other Nations*, in OCEAN GOVERNANCE, *supra*

a more comprehensive coastal water management plan. However, as with traditional land-based zoning, this tool regulates major new developments and major changes in use rather than transient uses. It should help minimize future use conflicts by geographically separating particular types of uses and directing them to the areas most capable of absorbing likely environmental impacts, but is not designed to facilitate resolution of conflicts among temporary or transient uses.

3. *Special Management Areas*

A third technique, special area management plans (SAMPs), generally allow for more detailed regulation than submerged lands leasing programs or marine zoning. Rather than being applicable only to proposed major development or substantial changes in use, they can also be used to regulate temporary or transient uses. However, due to the intensive effort and cost of developing such plans, SAMPs are likely to be developed only for the most intensely used or most environmentally sensitive areas.

An example of a particularly comprehensive management plan is the Florida Keys National Marine Sanctuary Management Plan.²⁸⁵ Applicable to an area of approximately 2,800 square nautical miles, it includes coastal and ocean waters, submerged lands and islands landward to the mean high water mark. The management plan, completed in 1996, was developed by NOAA in partnership with the State of Florida, and with the participation of other federal agencies, local governments, non-governmental groups, resource users and the general public.²⁸⁶ The purpose is to "ensure the sustainable use of the Key's marine environment by achieving a balance between comprehensive resource protection and multiple, compatible uses of those resources."²⁸⁷

note 205, at 28; *see also* Jens C. Sorensen & Scott T. McCreary, COASTS: INSTITUTIONAL ARRANGEMENTS FOR MANAGING COASTAL RESOURCES AND ENVIRONMENTS 19 (1990); Hans Olav Ibrekk et al., *Nationwide Assessment of the Suitability of the Norwegian Coastal Zone and Rivers for Aquaculture (LENKA)*, 21 COASTAL MANAGEMENT 53 (1993).

285. NAT'L OCEANIC AND ATMOSPHERIC ADMIN., FLORIDA KEYS NATIONAL MARINE SANCTUARY FINAL MANAGEMENT PLAN / ENVIRONMENTAL IMPACT STATEMENT (1996).

286. Key West residents voiced their opposition to the sanctuary in November of 1996, rejecting a nonbinding referendum in support of the Florida Keys National Marine Sanctuary. However, on January 28, 1997, Florida's governor and cabinet approved the management plan for the state-owned portion of the sanctuary. State approval was critical because two-thirds of this area is within state waters. Nancy Klingener, *Future of Sanctuary May Be Decided Today*, MIA HERALD, Jan. 29, 1997, at 1B.

287. *Id.* at Abstract.

The Management Plan consists of ten action plans, composed of integrated management strategies, to be implemented through a gradual process.²⁸⁸ The strategies address boating, fishing, land use, recreation, water quality, zoning and education.²⁸⁹ To supplement existing management areas such as national wildlife refuges and state parks, the Plan establishes four new marine zoning categories. These zones impose specific regulations, in addition to those applicable to the Sanctuary as a whole, on a very small percentage of the area. Unlike more traditional marine zoning discussed above, the emphasis of the Florida Keys zones is on controlling temporary user activities, rather than regulating proposed development.

Spaces in one zoning classification, Wildlife Management Areas, are already designated by the U.S. Fish and Wildlife Service.²⁹⁰ They protect endangered or threatened species and their habitats by restricting access and minimizing disturbance. Within the zone, areas are further designated for no wake/idle speed only, no motor use, closed, and no access buffer zones.²⁹¹ Ecological Reserves, a second classification, designates large, contiguous diverse habitats; to protect spawning, nursery and residence areas and allow species populations to replenish, consumptive activities are limited but compatible recreational activities are allowed.²⁹² The third zoning classification, Sanctuary Preservation Areas, proposed for shallow, heavily-used reefs, would minimize user conflicts and avoid further resource degradation in these areas by prohibiting fishing, collecting and all other consumptive uses.²⁹³ Eventually, but of lower priority, limited duration Special-Use Areas may set aside space for research or conserva-

288. The ten action plans are: (1) Channel/Reef Marking; (2) Education and Outreach; (3) Enforcement; (4) Mooring Buoy; (5) Regulatory; (6) Research and Monitoring; (7) Submerged Cultural Resources; (8) Volunteer; (9) Water Quality; and (10) Zoning. *Id.*

289. *Id.* at app. H.

290. *Id.* at 30.

291. *Id.* These areas would include bird nesting, resting, or feeding areas and turtle nesting beaches. Regulations could have a seasonal component, such as nesting season closures. *Id.* at app. H-15.

292. NATL OCEANIC AND ATMOSPHERIC ADMIN., *supra* note 285, at 31. In the Draft Management Plan, this zone type was referred to as Replenishment Reserves but NOAA changed the name to Ecological Reserves in the Final Management Plan to reflect public concerns over the purpose of the areas. These areas were proposed based on the assumption that they will protect biological diversity and increase the productivity of important marine species. They will be used as a control area to understand the impacts of human use, and will be reevaluated after five years to expand, modify or eliminate these zones. *Id.* at app. H-16.

293. *Id.* at app. H-16.

tion purposes, or confine high-impact activities such as powerboat racing, mooring fields, live-aboard areas or personal watercraft to limited areas.²⁹⁴ The Plan also relies on continued management of already designated parks, refuges and aquatic preserves.²⁹⁵

Some non-zoning strategies are also designated to address user conflicts. For example, the Florida Keys management plan includes: a channel marking program to limit boating activity in shallow-areas; a mooring buoy strategy to require use of moorings rather than anchors and to control mooring placement in particularly sensitive areas; a special-use permit system for concession-type commercial activity; and marina and live-aboard strategies to reduce pollution and concentrate activities where facilities are available.²⁹⁶ In contrast to more traditional marine zoning, this special area management plan is designed to control specific temporary activities and transient uses as well as permanent development in public waters. It employs many coordinated strategies, only some of which rely on zoning classification systems.

4. *Performance Standards*

Performance standards are a fourth type of management tool. Instead of zoning submerged lands or employing other direct geographic controls on activity location, they establish decisional criteria to guide state agencies or local governments in reviewing specific applications.

For example, Hawaii developed state planning and evaluation guidelines for private marina development in 1991. State agencies, recognizing that public funds would be unable to satisfy the need for additional recreational boating facilities, realized that private marina development would have to satisfy the growing demand. However, the state wanted to regulate private marina development in public waters to assure protection of the public's interest, minimize adverse impacts, maximize public benefits, and allocate valuable ocean space in a fair and equitable manner.²⁹⁷ The resulting performance standards include a set of siting criteria that: minimize dredging and blasting; prevent any contamination of

294. *Id.* Activities in these areas may be conducted by permit only. *Id.* at 34.

295. Referred to as Existing Management Areas, the function of these zones is to recognize established management areas and to, at a minimum, complement existing management programs. *Id.* at H-16.

296. *Id.* at 43.

297. OFFICE OF STATE PLANNING, STATE PLANNING AND EVALUATION GUIDELINES FOR PRIVATE MARINA DEVELOPMENT 6-7 (1991).

surface water or ground water; avoid environmentally sensitive areas such as wetlands, wildlife refuges, marine life conservation districts, and sanctuaries; assure adequate physical separation from other recreation water use areas; and avoid encroachment on scenic and open space resource.²⁹⁸

Similarly, through its Connecticut Coastal Management Act (CCMA), Connecticut established extensive goals and policies for the management of coastal lands and resources.²⁹⁹ Local actions must be in accordance with the policies, standards and evaluation procedures established by the CCMA.³⁰⁰ The statutory policies of the CCMA override any less restrictive state or local regulatory standards.³⁰¹ For local land use development proposals, the CCMA is enforced through a simultaneous Coastal Site Plan Review to determine if the proposed use is consistent with the state policies.³⁰² Local governments may also adopt municipal coastal programs which are consistent with the statewide goals and policies.³⁰³

Connecticut's policies are extensive and detailed, and provide some useful guidance to resolve use conflicts. For example, among the numerous policies, one requires a proposed use to be consistent with the capability of the land and water resources to support that use without significantly disrupting either the natural environment or sound economic growth.³⁰⁴ Another gives high priority and preference to uses which are dependent upon proximity to the water or shorelands.³⁰⁵ A third directs that in shorelands adjacent to marine and tidal waters, use conflicts are to be resolved by giving preference to uses that "minimize adverse impacts on natural coastal resources while providing long term and stable economic benefits."³⁰⁶ Specific provisions also give highest priority and preference in urban and commercial fishing ports to water dependent uses, "including but not limited to commercial and recreational fishing and boating uses."³⁰⁷ Other policies suggest some limits on how to accommodate the increased

298. *Id.* at 11.

299. CONN. GEN. STAT. § 22a-90 to -109 (1995).

300. *Id.* § 22a-101.

301. *Id.* § 22a-100.

302. *Id.* § 22a-109.

303. *Id.* § 22a-101.

304. *Id.* § 22a-92(a)(1).

305. CONN. GEN. STAT. § 22a-92(a)(3) (1995).

306. *Id.* § 22a-92 (a)(4).

307. *Id.* § 22a-92(b)(1)(C).

demand for recreational boating³⁰⁸ and address topics such as sewer and water lines, ports, oil and chemical spills, tank farms, tidal wetlands, habitat, urban infrastructure, estuarine resources, the shellfish industry, and recreational and commercial fisheries.³⁰⁹ These very detailed performance standards allow the state to establish policies for local implementation without the state itself engaging in zoning or other specific space allocation decisions.

5. *Ocean Management Plans*

In the last several years, resource managers have begun to develop more comprehensive resource allocation management plans for marine and coastal waters. These plans may enlist traditional physical space allocation mechanisms as part of the implementation strategy, but also utilize these tools within the context of a more holistic, integrated, ecosystem perspective. They focus not only on competing demands for the same space, but also on competing or incompatible demands for the same resource.³¹⁰ These resource allocation plans require a public interest balancing of many factors including recreational uses, commodity uses, wildlife habitat, and preservation/environmental issues.

During the last decade, frequently with the assistance of federal coastal zone management or Sea Grant funds, several states have developed ocean policy reports or ocean management plans.³¹¹ These reports usually inventory state and federal laws affecting marine waters from some upland boundary out to the 200 mile exclusive economic zone limit,³¹² identify

308. *Id.* § 22a-92(b)(1)(I).

309. *See id.* § 22a-92.

310. For example, California uses an ecosystem management approach in its ocean plan which stresses environmental protection rather than use conflict resolution. It analyzes ocean impacts by looking at four interdependent zones: the inland watershed from the mountains to the shoreline; enclosed waters zone including bays, estuaries, and subtidal areas; nearshore ocean zone including open coastal waters out to a depth of 100 meters; and offshore ocean zone including a depth of 100 meters to 200 miles offshore. THE RESOURCES AGENCY OF CAL., *supra* note 49, at 4-1. Oregon's ocean resources management plan contains two types of recommendations, one set for improving the tools for governing, and the other set for conservation and habitat protection of specific ocean resources. OR. OCEAN RESOURCES MANAGEMENT TASK FORCE, *supra* note 38, at 54.

311. *See* THE RESOURCES AGENCY OF CAL., *supra* note 49. CHRISTIE, *supra* note 31; HAW. OCEAN AND MARINE RESOURCES COUNCIL, HAWAII OCEAN RESOURCES MANAGEMENT PLAN (1991); McLAUGHLIN & HOWORTH, *supra* note 31; CLARK & WHITESSELL, *supra* note 193; OR. OCEAN RESOURCES MANAGEMENT TASK FORCE, *supra* note 38.

312. The jurisdiction of ocean management studies is typically open seas including

gaps and inconsistencies, and make recommendations for more integrated management of that area.³¹³ The goal is typically to get beyond the traditional sector-by-sector approach and facilitate rational multiple-use ocean management pursuant to a new comprehensive ocean resources management plan.³¹⁴ The issues vary, depending upon the conflicts and opportunities facing the state.³¹⁵

In theory, multiple-use ocean management should advance use conflict resolution throughout the stewardship area by establishing priorities for valued uses and establishing a framework within which to make decisions about space and resource allocation. However, in actuality, the geographic scope and activity emphases of most first generation ocean plans are not intended to address competition for space and resources on a scale relevant to resolving nearshore use conflicts.³¹⁶

In most states, the primary motivation for developing an ocean plan is to arm the state to defend itself against outside development interests in

both the state (0-3 miles) and federal (3-12 miles) territorial waters and the exclusive economic zone (0-200 miles), but generally does not include enclosed or semi-enclosed water bodies such as bays, estuaries, shorelines. However, states can define different boundaries. Oregon defines its "stewardship zone" as including less than the entire exclusive economic zone; it includes the entire continental margin from mean high water across the continental shelf and down to the bottom of the continental slope. OR. RESOURCES MANAGEMENT TASK FORCE, *supra* note 38, at 13. California defines its ocean ecosystem more broadly to include the inland watershed zone (from the watersheds of the Sierra Nevada to the shoreline) and enclosed waters (bays, estuaries and subtidal areas) as well as nearshore ocean (open coastal waters out to a depth of 100 meters) and offshore ocean zone (a depth of 100 meters to 200 miles offshore). RESOURCES AGENCY OF CAL., *supra* note 49, at 4-1.

313. RESOURCES AGENCY OF CAL., *supra* note 49, at 1-4 to 1-5.

314. *Id.*

315. For example, in California, the specific issues analyzed included habitats and living resources, water quality, shoreline erosion, ports and harbors, oil and gas, vessel traffic safety, tourism and recreation, research and education, information technology, mineral resource extraction, and desalination. RESOURCES AGENCY OF CAL., *supra* note 49, at 2-1. Similarly, Oregon was concerned about not only traditional conflicts in the use of renewable resources, but was also concerned about the introduction of new non-renewable uses such as marine minerals extraction and oil and gas exploration. OR. OCEAN RESOURCES MANAGEMENT TASK FORCE, *supra* note 38. North Carolina focused on minerals, oil and gas, fisheries, pollutants, ocean dumping, recreational uses, and marine protected areas. Other states have focused on additional issues such as marine transportation, recreational fisheries, aquaculture, ocean waste disposal, and military activity. CICIN-SAIN, *supra* note 31, at 14.

316. *But see infra* text accompanying notes 318-334 for a discussion of Oregon's Territorial Sea Plan, a second generation component of the original Ocean Resources Management Plan.

federal waters through the federal consistency review process.³¹⁷ As a result, ocean plans typically focus on the exclusive economic zone and federal activities in federal waters beyond the three-mile territorial sea which could affect states and localities. Thus, these ocean plans emphasize shared state-federal decision-making, equitable division of costs and benefits of development of resources, and documentation of shoreland impacts and risks of offshore activities.³¹⁸

However, even though most ocean management plans devote little attention to conflict resolution among temporary uses in coastal waters, it is important to recognize that ocean planning is still in its infancy and is continuing to evolve. Oregon's ocean planning and management process, one of the most advanced, illustrates the potential of this approach to resolve use and resource conflicts. Oregon's 1991 Ocean Plan states its broad state-wide goals are to:

protect the overall integrity, diversity, stability and complexity of the marine ecosystem; and give priority to the conservation of renewable resources; to renewable resource uses over nonrenewable resource uses; and to non-consumptive uses over consumptive uses.³¹⁹

These general goals are elaborated upon in sector-specific recommendations.³²⁰ These recommendations are then tied to specific geographic areas.³²¹ In addition to identification of sensitive areas for marine birds and mammals, the plan envisions the identification of other important areas, such as fishery areas where nonrenewable resource uses will not be allowed.³²²

317. CICIN-SAIN ET AL., *supra* note 31, at 16, 21.

318. While the most aggressive states have generally been on the West Coast, the need for state participation in these decisions was also embraced by New England governors in a 1987 proclamation on behalf of their citizens resolving that the New England states "might be full partners in the management of Exclusive Economic Zone resources and share in an equitable division of benefits derived from their development." *Id.* at 4 (quoting New England Governor's Conference Proclamation issued Dec. 15, 1987).

319. OR. OCEAN RESOURCES MANAGEMENT TASK FORCE, *supra* note 38, at 54. Such goals include the protection the overall integrity, diversity, stability and complexity of the marine ecosystem and the conservation of renewable resources. *Id.*

320. *Id.* at 90-91.

321. *Id.* at 119-20.

322. *Id.*

Oregon's ocean plan included some guidance for the territorial sea portion of the ocean stewardship area. For example, it recommended that the state "prohibit development activities in the territorial sea which would impair the cultural, scenic, or recreational values of the near shore areas."³²³ It also recommended prohibition of oil and gas exploration and development within the state territorial sea.³²⁴ However, for coastal waters, the most significant recommendation in the ocean plan was that the state develop a separate management-oriented territorial sea plan which would be a component of the ocean plan.³²⁵

In 1994, Oregon adopted such a territorial sea plan.³²⁶ The plan, though a work in progress, requires state agencies to amend their programs and rules for ocean resources so as to be consistent with the territorial sea plan.³²⁷ Federal agencies must also act in a manner consistent with the enforceable policies of the territorial sea plan as it has been accepted by the federal Office of Coastal and Ocean Resource Management as part of Oregon's federally-approved Coastal Management Program.³²⁸

The 1994 territorial sea plan includes three major elements: (1) an overview of the ocean management framework, with an emphasis on the territorial sea, (2) a rocky shores management strategy, and (3) procedures and standards "for making future decisions about ocean resource activities unknown or unanticipated today."³²⁹ The resource use decision section of the plan sets out criteria to guarantee that new uses in or affecting the territorial sea will be allowed only after informed decision making.³³⁰ It builds in a precautionary principle by placing the burden on the applicant.³³¹ If the information is insufficient or incomplete, the agency may terminate the decision-making process until the information is available.³³² Or at its option, the agency may authorize a pilot project, to take place under restricted and controlled conditions, to gather the requisite

323. *Id.*

324. *Id.* at 139.

325. OR. OCEAN POLICY ADVISORY COUNCIL, OREGON OCEAN MEMO NO. 10 at 1 (1993). The territorial sea plan was developed by the Ocean Policy Advisory Council, a group composed of state agency representatives, governmental subunit representatives, appointed representatives of user groups, and appointed members of the general public.

326. OR. OCEAN POLICY ADVISORY COUNCIL, *supra* note 51.

327. OR. REV. STAT. ANN. § 196.435 (2) (1993).

328. OR. OCEAN POLICY ADVISORY COUNCIL, *supra* note 51, at 2.

329. *Id.* at ii.

330. *Id.* at 43-64.

331. *Id.*

332. *Id.* at 48.

information.³³³ The procedure emphasizes that any government agency making a decision about marine resources and uses must comply with the Territorial Sea Plan, Oregon's ocean law, Statewide Planning Goal 19 on Ocean Resources, the Ocean Resources Management Plan and any amendments, including any detailed guidance on resource conservation associated with these plans, goals and laws.³³⁴

Emerging comprehensive ocean management plans have the potential to bring a more holistic, ecosystem management approach to use conflict resolution. The geographic scope and activity emphases of most first generation ocean plans and studies are too broad to make a significant contribution to resolving specific user conflicts. But with successive generations of more detailed plans, they can increase the focus on the states' territorial sea and develop specific management strategies for areas experiencing the greatest user conflicts.

V. CONCLUSION AND RECOMMENDATIONS

Conflict resolution strategies for use in states' coastal waters are still in the initial stages of development. More empirical evidence will be required to determine if these particular approaches will successfully protect the public interest and reduce user conflicts. It is clear, however, that as conflicts escalate, states must more forcefully assert their role as public trustee by developing a comprehensive plan for the states' coastal waters. To be effective, they must establish resource use priorities and develop guidance and systems to mediate conflicts among user groups. In the absence of state leadership, resource and space allocation may be made by self-help appropriation, citizen-initiated referenda, special interest legislation, or other ad hoc methods which offer less than optimal protection for the broad public interest in this valuable resource.

The threshold requirement for effective management of states' coastal waters is a comprehensive plan to inventory existing conditions and conflicts, identify future opportunities, select among the alternative futures, and articulate goals and objectives. Oregon's ambitious ocean management/territorial sea planning process provides a good model for states like Maine that have recognized the problem but that are just beginning to develop management plans. It advocates an ecosystem approach to management based on detailed inventories, furthers the goal of

333. *Id.*

334. OR. OCEAN POLICY ADVISORY COUNCIL, *supra* note 51, at 44.

maintaining the health of the habitat and ecosystem, and contemplates increasingly detailed special area management plans for specific environments of its coastal shorelines and waters.

The various state coastal waters management initiatives suggest coastal conflict management plans will be strongest if they:

- (1) are authorized by legislative action mandating the development of a plan for coastal waters;³³⁵
- (2) thoroughly analyze existing laws and regulations to evaluate the geographic scope and use priorities, both express and unwritten, to reconcile inconsistencies;³³⁶
- (3) incorporate procedural mechanisms to coordinate multiple local, state and federal agencies, each with some limited authority over the waters;³³⁷
- (4) clearly delineate the respective roles of different levels of government in planning and implementation;³³⁸ and
- (5) establish mechanisms for the continued refinement of management strategies until they are capable of implementing concrete measures to resolve use and resource conflicts.³³⁹

Several techniques appear capable of furthering conflict resolution in coastal waters. These techniques include submerged lands leasing pro-

336. Most state ocean management plans contain a section inventorying and analyzing federal and state laws affecting coastal and ocean waters. For example, Florida's ocean study, prepared for the Governor's Office of Planning and Budgeting, works toward a state ocean policy by first undertaking a very thorough analysis of the scope of authority and degree of consistency of laws and policies of multiple state agencies which govern some aspect of the territorial sea or beyond. CHRISTIE, *supra* note 31. Coastal scholars in Mississippi undertook a similar analysis through a Sea Grant-funded study. MCLAUGHLIN & HOWORTH, *supra* note 31.

337. See *supra* notes 202-223 and accompanying text.

338. Some ocean plans have addressed the division of state and local authority. For example, California's ocean plan recommends some state-wide positions such as a prohibition on new oil and gas leasing in all state tidelands, recommends continued reliance on local management to control conflicts such as separating surfing and swimming, and suggests conflicts with "greater than local significance" such as use of personal watercraft, recreational boating, shark chumming and species/tourism conflicts be addressed at regional, state or federal levels. RESOURCES AGENCY OF CAL., *supra* note 49, at 5E-7, 5G-4 to -5. A similar distinction was made in North Carolina after an ocean stewardship study concluded that state's Coastal Area Management Act of 1974 was inadequate to manage coastal waters. CLARK & WHITESELL, *supra* note 193, at 20.

339. See *supra* notes 309-318 and accompanying text.

grams, comprehensive marine zoning, special management areas, and state-wide performance standards. Ideally, these tools should be used to implement a territorial sea component of a comprehensive ocean management plan which incorporates a socially-approved priority system for resource allocation, space allocation, and allowable resource degradation. The plan should include detailed guidelines on priorities and tradeoffs among user groups as well as a decision-making process for evaluating proposed uses not specifically addressed in the plan. If a state is not yet ready to prepare a full ocean management plan, a more limited territorial sea plan can nonetheless make a substantial contribution to conflict resolution.

To effectively minimize conflicts, any system for management of coastal waters must control temporary or transient uses as well as permanent uses and alterations. If particular uses lack state-wide or regional significance, states may opt to defer to local governments to control the details of nearshore temporary uses. To avoid inaction created by uncertainty, states should expressly delegate this responsibility to local governments and should grant them jurisdiction over a fixed distance offshore, regardless of historic local boundaries. States should, however, maintain oversight and establish general guidelines to ensure that local action is consistent with the state's comprehensive plan for its coastal waters.

Making the political decision to provide the state leadership necessary to adopt and implement a comprehensive management program for coastal waters is an important first step. This decision is easily justified by the fact that coastal waters are a public resource of the state and that the state has a fiduciary responsibility to hold and manage these lands for the benefit of the public. Not all uses can be accommodated though, and hard choices must be made to minimize the costs of continued, unresolved conflict. These choices are better made by the state; self-regulation by stakeholders or privatization are inappropriate to resolve current disputes over use of this common property resource.

The more difficult task will be to develop a consensus on the appropriate goals for coastal waters and to elaborate a hierarchy of uses and decision-making criteria at a level of detail sufficient to guide concrete management decisions. There are an array of techniques, both procedural and substantive, available to states to get beyond the fragmentation currently caused by multiple single-focus agencies, narrow purpose laws and concurrent jurisdiction. The challenge rests with coastal states to develop the scientific base needed for rational management, to establish goals and priorities for space and resource use, to implement strategies to

minimize use conflicts, and to advance those uses deemed to be most beneficial to the public and of highest priority for coastal waters.

